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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Wheaton Glass Company hereby petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on January 13, 1970.

OPINIONS BELOW.

The opinion of the District Court on the merits is reported at 284 F. Supp. 23, and is printed in Appendix B, pp. A38-59. The opinion of the Court of Appeals is not yet officially reported, and is printed in Appendix B, pp. A64-77. On February 13, 1970, the Court of Appeals amended its opinion by an Order which is not yet officially reported. That Order is printed in Appendix B, p. A78. The opinion of the District Court striking Petitioner's demand for a jury trial is not officially reported, and is printed in Appendix B, pp. A31-36.

JURISDICTION.

The judgment of the Court of Appeals of which review here is sought was entered on January 13, 1970, and a timely petition for rehearing was denied on February 13, 1970, Appendix B, p. A79. The Order of the District Court striking Petitioner's demand for a jury trial was entered on May 2, 1966, Appendix B, pp. A36-37.[1] The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

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1. The District Court granted certification of its Order for interlocutory appeal on May 9, 1966, amending its prior Order of May 2, 1966, Appendix B, p. A37. The Court of Appeals, by Order dated June 9, 1966, denied leave to appeal the District Court's Order pursuant to 28 U. S. C. § 1292(b), Appendix B, p. A38. The issue of whether Petitioner had the right to a jury trial was first presented to the Court of Appeals, when it first became relevant, in its petition for rehearing.

QUESTIONS PRESENTED.

The Secretary of Labor brought suit against Petitioner for injunctive relief and back pay, alleging a violation of the Equal Pay Act of 1963, 29 U. S. C. § 206(d). The Complaint charged that Petitioner was unlawfully paying its male selector-packers more than its female selector-packers for performing "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." (Boldface supplied.) (Appendix D, p. A85.) The District Court held that Petitioner had not violated the Equal Pay Act, finding that the proof amply demonstrated that the males performed as part of their job some 16 additional tasks beyond those performed by the females and were therefore "required to exert additional effort, to possess additional skill and to have additional responsibility, which [tasks] frequently are performed and discharged under the ever changing demands of working conditions, dissimilar to those prevailing for women." Appendix B, p. A59. The Court of Appeals did not upset these findings of fact, but nevertheless reversed. It did so on the novel theory, which violates the statutory language, the legislative history, the administrative regulations, and the theory on which the case was tried, that even where the jobs are not equal, the court can nevertheless inquire into the basis for the *amount* of the wage differential, and find a violation of the Equal Pay Act where it concludes that *part* of the differential is not justified. Petitioner's demand for a jury trial was stricken by the District Court, and the Court of Appeals denied interlocutory review. The questions presented are:

1. Whether the Equal Pay Act of 1963 permits, once the court has found that performance of one of the jobs

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requires additional skill, effort or responsibility, a job evaluation inquiry by the court into the amount of a particular wage differential between male and female workers;

2. Whether Congress by adoption of the Civil Rights Act of 1964 intended to change the clear language of the Equal Pay Act of 1963, which provides that once it is shown that the jobs performed by males and females are different, the employer does not have to justify the *amount* of the difference; and

3. Whether a defendant in an action commenced by the Secretary of Labor under the Equal Pay Act of 1963, to enjoin violations of the Act and to restrain defendant from withholding back wages resulting from such alleged violations, is entitled to a jury trial upon a proper demand therefor.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

The statute involved is the Equal Pay Act of 1963, 77 Stat. 56, 29 U. S. C. § 206(d). It provides:

> "(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such

payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

The provisions of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.*, are also relevant, in light of the ruling of the Court of Appeals, to the disposition of the questions presented herein. They are printed in Appendix A, pp. A1-30.

The constitutional provision involved is the Seventh Amendment, U. S. C. A. Const. Amendmt., VII, p. 134. It provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE.

This action was instituted by the Secretary of Labor under the Equal Pay Act of 1963, 29 U. S. C. § 206(d), pursuant to Section 17 of the Fair Labor Standards Act of 1938, 29 U. S. C. § 217, for injunctive relief and for back pay. The *sole charge* in the Complaint was that Petitioner was violating the Equal Pay Act by discriminating "between employees on the basis of sex by paying wages to [female] employees in such establishment at rates less than the rates at which it pays wages to employees of the opposite [male] sex in such establishment for **equal** ***work on jobs the performance of which requires*** **equal skill, effort, and responsibility,** ***and which are performed under similar working conditions."*** (Emphasis and boldface supplied.) (Appendix D, p. A85.)

Petitioner, Wheaton Glass Company, is one of the largest manufacturers of glass containers in the United States, employing some 2,200 hourly employees (2 App. 974).[2] Its operations fall generally into two parts, those performed at the so-called "hot end" of the plant, where

2. All citations to the Appendix from the District Court will be preceded by the volume and followed by the page numbers. In successive citations, the volume will not be repeated where it remains the same.

glassware is manufactured, and those at the "cold end" where glassware is inspected, selected, and packaged (2 App. 914).

The jobs involved herein are those of selector-packer male and selector-packer female, both of which are performed at the "cold end" of the plant.

In view of the narrow scope of the issue framed by the pleadings and permitted by the Equal Pay Act, the trial was confined to one question: Whether performance of the jobs of selector-packer male and selector-packer female required equal skill *and* equal effort *and* equal responsibility under similar working conditions.

The trial Court concluded that there were essential and substantial differences between the two jobs. The record testimony established that selector-packers male perform, as part of their job, at least 16 additional duties which are neither required of nor performed by selector-packers female and the performance of which require additional skill, effort and responsibility (2 App. 925, 928-934, 942, 944-946, 950-951, 953, 955, 958, 960, 963-964, 973, 978-985, 1037, 1059, 1076-1077, 1083-1084, 1088-1089, 1096-1099, 1111, 1121, 1157-1159, 1210, 1222, 1229-1231, 1259-1267, 1270, 1282, 1306-1315, 1318, 1331-1344). On the solid basis of this and other evidence, the District Court found as facts (Appendix B, pp. A43-44):

> "In addition to selecting and packing, along with females at the lehr, other duties of the male selector-packers are as follows: (1) to lift anything weighing approximately in excess of 35 pounds; (2) to lift any bulky or unhandy cartons, regardless of weight; (3) to stack full cartons on wooden pallets, a process known in the trade as 'palletizing,' in the area of the related lehr; (4) to tie securely stacks of cartons on the pallets; (5) to move and place fully loaded pallets for further disposition; (6) to carry, move, place and stack empty

pallets for later use; (7) to operate hand trucks in the areas of the lehrs; (8) to carry, move, position, install, set-up and adjust portable roller conveyors and packing 'bucks' (waist high stands or racks positioned next to the moving conveyor, which hold empty cartons for filling); (9) to collect, carry and dump trays and tubs of cullet (rejected glassware); (10) to sweep and clean all work areas in and around the aisles near the lehrs, and to prepare for job changes; (11) to cut glass stoppers with a diamond saw at the lehrs; (12) to fit and attach metal clips to glass containers at the lehrs; (13) to unjam overhead carton conveyors and automatic cullet belts; (14) to occasionally reinspect, repack and restack delivered glassware on customers' premises; (15) to locate certain glassware in defendant's warehouse, which at times may involve climbing over stacks of palletized ware; and (16) to work, if necessary, in excess of 10 hours in any one work day and in excess of 54 hours in any one work week.

"The females perform little or none of the foregoing duties . . .

"Such then, in general outline, is the factual picture of the operations of the department in question, as well as some of the more specific duties of the selector-packers, as established by the testimony . . ."

The testimony adduced at trial further demonstrated that in 1956 a portion, *and only the light duty portion consisting of selecting and packing,* of the total selector-packer job which had been performed *since at least 1946 solely by males* was carved out and assigned to females *as a separate and different job* because of the shortage of males on the labor market (2 App. 930-934, 953-954, 963-965, 1023, 1088,

1220, 1224-1226, 1236, 1259-1261, 1263-1264, 1267-1268, 1278, 1344). Thus, the District Court found as facts (Appendix B, p. A45):

> ". . . The shortage of available men in the Millville labor area required the defendant to resort, for the first time, to the employment of females as an adjunct to its depleted male labor force. At this time [1956] the Union adopted the position that a *new job* must be created for females *different* from that of males. It was to be confined to *light-duty work*, comparable to other light duty provided for female employees throughout the defendant's plant. A further condition was that no bulky or heavy lifting of any carton over 35 pounds was to be permitted, and that no male selector-packer was to be displaced by a female, except to fill a vacancy resulting from death or resignation. The parties agreed and, accordingly, *there was carved out of the total job of selector-packer, a segment heretofore performed exclusively by the male;* then there was created a new role of female selector-packer to whom there was assigned *lighter duties* at the lehr, consisting solely of selecting and packing." (Emphasis supplied.)

The trial court further found as a fact that, although women were abundantly available at 21½ cents an hour less than males, *not a single female was hired as a selector-packer for 3¾ years from August 12, 1962 to May 12, 1966,* during which time 1,279 males were hired because of Petitioner's need for employees who could do the *total* job (2 App. 1119-1120). It was not until the supply of males in the local labor market was again exhausted that Petitioner recommenced hiring selector-packers female (2 App. 1120-1121). This was considered by the trial court as additional

evidence that the jobs being performed by selector-packers male and selector-packers female were substantially and essentially different and not merely the product of some artificial classification (Appendix B, pp. A47-48). Further corroboration of this fact was supplied by one of respondent's own witnesses, a labor union official, who admitted on cross-examination that he had complained to Petitioner because a selector-packer female allegedly had been assigned to perform housekeeping around the lehrs and moving cullet, *heavy duties for which she was not being paid* (2 App. 799-803).

The Court of Appeals relied heavily on the fact that the trial court did not expressly state that "all" selector-packers male performed the 16 additional duties as part of their job. However, any fair reading of the trial court's opinion demonstrates that the word "all" was understood and, in any event, the uncontradicted evidence demonstrated that: (1) All of the selector-packers male are called upon to and do perform the 16 additional duties, all of which are a part of their job (2 App. 915, 925-926, 930-934, 945, 953, 963-964, 1020, 1070, 1263, 1278, 1353); (2) Since 1956, all of the selector-packers male, and none of the selector-packers female, have spent from 15% to 20% of their time in the performance of the 16 additional duties (2 App. 977-978, 1154, 1157, 1204, 1211, 1274-1275, 1326, 1345); and (3) The performance of said duties is essential to the operations of the selecting and packing department and is required on every shift in every work day (2 App. 953-954, 963-964, 1020, 1077, 1353).

Petitioner adduced extensive testimony based, *inter alia*, on documentary evidence for the purpose of demonstrating the substantiality of the difference between the selector-packer male and selector-packer female jobs. For example, an investigation by a professional industrial engi-

neering expert[3] demonstrated that: (1) Selector-packers female spend 98.04% of their time solely selecting and packing, whereas selector-packers male spend only 81.74% of their time selecting and packing (2 App. 1154, 1157, 1204); (2) Only selector-packers male perform filled carton-lifting regardless of weight or bulk, material handling and pallet loading, mechanical adjustment and maintenance, janitorial and work place arrangement, and additional job duties such as obtaining packing material, unjamming overhead carton conveyors, carrying and dumping trays and tubs of cullet (2 App. 1155-1157, 1215-1220); and (3) Selector-packers male lift *more* cartons, as well as heavier cartons, than selector-packers female (2 App. 1220).

Finally, Petitioner's witnesses, including the only industrial engineering expert witness, stated with explanation and without qualification that the additional duties performed solely by selector-packers male required all of them to exert **additional physical effort**, to have **different and additional skills** and to assume **additional responsibilities** often under **different and more adverse working conditions** as contrasted to the light-duty job of solely selecting and packing glassware (2 App. 933-935, 963, 978-980, 1158-1159, 1161, 1196-1197, 1209-1210). The industrial engineering expert also testified that the substantial differences in the jobs were sufficient to justify, *as a matter of job evaluation,* a differential in wage rate (2 App. 1160-1162, 1202-1203). In reliance on this and other testimony,[4] the trial court found (Appendix B, p. A59):

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3. Said investigation was performed pursuant to a professionally accepted and customarily used work measurement technique known as "work sampling" (2 App. 1140-1146) and resulted in 5,455 observations, which were spread around the clock over all four crews and all three shifts (2 App. 1139-1146, 1150-1151).

4. The District Court's general observation regarding its obligation, in a nonjury case, to weigh the credibility of the testimony cannot be ignored (Appendix B, p. A44):

"It should be observed, particularly in a nonjury case, that the *crucial issue of credibility* requires careful scrutiny, analysis

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"It is the extended scope of the male's job requirements coupled with other distinguishing factors, heretofore set forth, and their cumulative effect upon which focus must be directed. So viewed, *the proof amply demonstrates* that men and women do not perform equal work under similar conditions within the intendment of the Act. To the contrary, *men are required to exert* **additional effort,** *to possess* **additional skill** *and to have* **additional responsibility,** *which frequently are performed and discharged under the ever changing demands of working conditions, dissimilar to those prevailing for women.*" (Emphasis and boldface supplied.)

All of the aforesaid facts found by the trial court are grounded upon substantial credible record testimony, and none was found by the Court of Appeals to be against the weight of the evidence.

Although it did not reject any of the findings of the District Court detailed above, the Court of Appeals nevertheless reversed. It did so on the ground that the *amount* of the particular wage differential was unjustified, and that this fact, considered alone, was sufficient to establish a *prima facie* violation of the Equal Pay Act, even where the jobs in question were *not* equal in skill, effort, and responsibility, and where *some* differential in wages was justified.

Recognizing that the findings of fact of the trial court, which were so firmly based upon the record testimony, could

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and assessment of the testimony of each and every witness. In doing so, it seems obvious that those witnesses presented by the plaintiff, of necessity, understandably provided a limited view, circumscribed by their time and work areas, while those of the defendant presented a broader view of the overall scope of the operation of the entire department. Furthermore, it may be mentioned that the tempering influence of self-interest, as it might understandably affect each witness, has been taken into consideration." (Emphasis supplied.)

not be disturbed,[5] the Court of Appeals extended the scope of the Equal Pay Act far beyond that contemplated by Congress, and performed a judicial job evaluation of three jobs: selector-packer male, selector-packer female and base-rate male.[6]

REASONS FOR GRANTING THE WRIT.

The Court of Appeals recognized that this case "presents important problems in the construction of the Equal Pay Act," particularly because the Act "has not been authoritatively construed by the Supreme Court." (Appendix B, pp. A64, 72.) Respondent, moreover, has conceded that "the issues involved go far beyond this particular case, and basically affect the entire administration of the Act," and "are of the greatest importance to the effective administration and enforcement of this new and difficult law."[7] (Appendix B, pp. A61-62.) Resolution by this Court of the vital issues presented by this case is thus appropriate, particularly since the decision of the Court of Appeals has expanded the scope of the Equal Pay Act contrary to clear statutory language, express legislative history, rulings and regulations promulgated by the Department of Labor, and the basis on which the case was tried before the District Court.

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5. See, for example, *United States v. Yellow Cab Co.*, 338 U. S. 338, 339-342 (1949), *Speyer, Inc. v. Humble Oil & Refining Co.*, 403 F. 2d 766, 770 (3rd Cir. 1968), *Hadco Products, Inc. v. Frank Dini Co.*, 401 F. 2d 462, 464 (3rd Cir. 1968) and *Williams v. The Babcock & Wilcox Co.*, 262 F. 2d 253, 256 (3rd Cir. 1959) *cert. denied* 359 U. S. 969 (1959).

6. The irrelevance of the latter job is illuminated by the fact that, "Their higher rate is not challenged." 284 F. Supp. at 26. Moreover, not a single base-rate male was called as a witness.

7. Respondent also noted before the Court of Appeals that "defendant's arguments raise questions involving virtually all of the crucial terms of this new Act, as well as the Act's fundamental purposes and objectives." (Appendix B, p. A62).

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1. The Equal Pay Act provides, in relevant part, that no employer shall discriminate between employees on the basis of sex by paying different wages "for *equal* work on jobs the performance of which requires *equal* skill, effort, and responsibility, and which are performed under *similar* working conditions. . . ." (Emphasis supplied.) 29 U. S. C. § 206(d).[8] However, performing a judicial job evaluation *at the appellate level*, the Court of Appeals has ruled that the Department of Labor satisfied its admitted burden of proof[9] under the Equal Pay Act simply by demonstrating that, even though a wage difference in some amount was justified, and even though performance of the higher paid job required additional skill, effort, and responsibility, the precise *amount* of the particular wage difference was not justified. If the decision of the Court of Appeals were permitted to stand, the Department of Labor will be equipped with the very "hunting license" to evaluate jobs in every industry employing women which Congress consciously sought to avoid.[10] The Bureau of Labor

8. Respondent's own regulations provide that:

"What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined . . . The terms are considered to constitute three separate tests, *each of which must be met in order for the equal pay standard to apply*." (Emphasis supplied.) 29 C. F. R. § 800.122.

9. See 109 Cong. Rec. 9208 (remarks of Rep. Griffith):

"I should like to make it clear that the burden of proof to show a violation is on the Secretary of Labor; he must prove that any differential in pay which exists is actually based on sex, and he will have to sustain that burden of proof. I think this is a very important part of the legislative history."

See also 29 C. F. R. § 800.141.

10. Such a wide range of discretion in the Department was not intended by the draftsmen of the Equal Pay Act. As Representative Frelinghuysen, a member of the subcommittee which considered and prepared the Act, stated:

"Thus it is apparent that a number of important changes have been made by our committee. As a result, we can expect that the administration of the equal pay concept, while fair and

Statistics has estimated that, as of August, 1968, more than 29.5 million women were employed in the United States, constituting nearly 39 per cent of the total labor force.[11] Since the Equal Pay Act expressly prohibits an employer from reducing the wage rate of his male employees when an equal pay violation is established,[12] the effect of the decision of the Court of Appeals would be to raise the wage rate of large numbers of female employees in every industry to a par with those of males even though performance of their jobs required less skill, effort and responsibility than performance by the males of their jobs. Indeed, this fact alone demonstrates the clear error of the Court of Appeals, which conceded that *some* differential was justified in Petitioner's case.

2. The decision of the Court of Appeals was incorrect under the clear statutory language, the legislative history, and the rulings and regulations of the Department of Labor. Despite the fact that the *equal* pay for *equal* work statute can be violated only by payment of different wages for the performance of *equal* work requiring equal skill *and* equal effort *and* equal responsibility, and despite the fact that the courts uniformly have held that the statute is inapplicable wherever different skill *or* effort *or* responsibility is required,[13] and *even though the males performed*

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effective, will not be excessive nor excessively wide ranging. What we seek is to insure, where men and women are doing the *same job* . . . that they will receive the *same pay. It is not intended that either the Labor Department or individual employees will be equipped with hunting licenses.*" (Emphasis supplied.) (109 Cong. Rec. 9196)

11. *United States Bureau of Labor Statistics, Employment and Earnings* (Aug. 1968).

12. 29 U. S. C. § 206(d)(1) (proviso).

13. E.g., *Schultz v. Kentucky Baptist Hospital,* 62 CCH Labor Cases ¶ 32,296 (W. D. Ky. 1969) (additional skill, effort, and responsibility in view of male security and protection responsibilities); *Wirtz v. American Can Co.,* 288 F. Supp. 14 (W. D. Ark.

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some 16 additional tasks requiring additional skill, effort and responsibility,[14] the Court of Appeals concluded that Petitioner had violated the Equal Pay Act because the *amount of the differential* was too great. The Court of Appeals reached this decision only by exceeding its authority and performing a judicial job evaluation at the appellate level. This ruling, which significantly expands the scope of the statute far beyond that contemplated by Congress, presents a question of substantial national importance in the administration of the Equal Pay Act.

Since the Court of Appeals felt that at least *some* wage differential was justified, its conclusion that Petitioner must raise its female wages to the level of the males, without receiving in return from the females the additional work performed by the males, demonstrates its clear error under an act requiring *equal* pay for *equal* work. Such a result would in fact be discriminatory against males and disruptive of labor-management evaluation of an employee's work and how much he should be paid for it. As Repre-

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1968) (different effort in view of male performance of paper-handling and loading functions); *Wirtz v. Stanley Home Products, Inc.*, 58 CCH Labor Cases ¶ 32,057 (N. D. Okla. 1968) (different effort in view of male duties to move, lift, and carry items, and to perform "certain disagreeable tasks, such as cleaning the incinerator"); *Wirtz v. Dennison Mfg. Co.*, 265 F. Supp. 787 (D. Mass. 1967) (different skill and effort in view of male duties to change over and repair machines, and move materials to and from machines.)

14. The Court of Appeals felt that it had not been shown that all of the males performed these additional tasks. As was demonstrated above in the statement of the case, however, *all* of the males are called upon to and do perform, each of the additional tasks (2 App. 915, 925-926, 930-934, 945, 953, 963-964, 1020, 1070, 1263, 1278, 1353), and the opinion of the District Court so holds (Appendix B, pp. A43-44, 59). Indeed, it is clear that the Court of Appeals failed to properly weigh the findings of fact of the District Court and the permissible inferences therefrom in conflict with the decisions in *Triangle Cable & Conduit Co. v. FTC*, 168 F. 2d 175, 179 (7th Cir. 1948), *affd.* 336 U. S. 956 (1949); *United States v. Yellow Cab Co.*, 338 U. S. 338, 339-342 (1949); and *Midwestern United Life Ins. Co. v. Brennan*, 417 F. 2d 147, 149 (7th Cir. 1969).

sentative Goodell, a member of the subcommittee which considered and proposed the Act,[15] stated, the province of the Act is quite limited:

> "It is our intention, I believe, on both sides of the aisle to provide here with the use of the terms 'effort', 'skill', 'responsibility' and 'working conditions' a maximum area for the interplay of intangible factors that justify a measurement which does not have to be given a point-by-point evaluation. *In this concept, we want the private enterprise system, employer and employees and a union, if there is a union . . . to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.*" [16] (Emphasis supplied.) (109 Cong. Rec. 9198)

Indeed, both Representatives Frelinghuysen and Goodell gave specific examples of jobs *not* covered by the Act, which examples are virtually identical to the factual situation presented herein.[17] Thus, Representative Frelinghuysen observed that:

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15. Congressman Goodell authored the first bills in either body of Congress to place the Act under the Fair Labor Standards Act and to use the terms "effort", "responsibility" and "working conditions" in defining equal work.

16. The District Court held, ". . . [W]e find that at the time of the creation of the job of female selector-packer in 1956, both the defendant and the union agreed upon a 10 percent differential rate between the men and the women. In so doing, the parties took into consideration the limitations of *effort, knowledge, skill* and *responsibility* of the new job as well as comparable jobs throughout the plant, community and industry." Appendix B, p. A46. (Emphasis supplied.)

17. The legislative intent of Congress is to be gleaned from the observances of such sponsors of legislation. *Natural Woodwork Mftrs. Assn. v. NLRB*, 386 U. S. 612 (1967); *NLRB v. Fruit & Veg. Packers*, 377 U. S. 58, 66 (1964); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 394-395 (1951).

> ". . . [T]he male packagers may be required to *lift* the heavy *crates* off the assembly line and place them on dollies or do various jobs requiring *additional physical effort.* The women selectors may work on the assembly line, selecting small items, for example, and placing them in crates. This would be a *significant difference which would justify a difference in pay.*" (Emphasis supplied.) (109 Cong. Rec. 9196)

The District Court found *as a fact* that selector-packers male lift crates and perform some 15 additional tasks involving "additional physical effort." Representative Goodell also observed that:

> "A difference in pay between male selectors and packers and female selectors and packers could be valid, if, in addition to the duties performed by the female selectors and packers, the male selectors and packers are required to *lift* the *crates* off the assembly line, *or sweep* up the room *or* work on the loading dock during slack periods." (Emphasis supplied.) (109 Cong. Rec. 9209)

Again, the District Court found *as a fact* that Petitioner's selector-packers male lift crates *and* sweep up *and* perform 14 additional tasks requiring them "to exert additional effort, to possess additional skill and to have additional responsibility. . . ." Appendix B, p. A59.[18]

That the Court of Appeals misread and impermissibly extended the scope of the Equal Pay Act is further demonstrated by considering the Department of Labor's own regulations. Thus, 29 C. F. R. § 800.122 provides that "the

18. Significantly, at the trial, two females admitted on cross-examination that it would be accurate to describe the different jobs performed by the males and the females in language virtually identical to that used by Congressmen Frelinghuysen and Goodell (1 App. 309, 463).

terms [equal skill and equal effort and equal responsibility] are considered to constitute three separate tests, *each* of which must be met in order for the equal pay standard to apply." (Emphasis supplied.) Considering only one of the 16 additional tasks performed by selector-packers male (weightlifting in excess of 35 pounds) and only one of the three separate tests under the Act (equal effort), it is clear that the Department of Labor did not sustain its admitted burden of proof. Thus, 29 C. F. R. § 800.127 clearly establishes that:

> "The jobs to which the equal pay standard is applicable are jobs that require equal effort to perform. *Where substantial differences exist in the amount or degree of effort required to be expended in the performance of jobs, the equal pay standard cannot apply even though the jobs may be equal in all other respects* . . . Effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job." (Emphasis supplied.)

The Department's own regulations further prohibit attempts at judicial job evaluation by examining the *amount* of the particular wage differential in question:

> "There are, of course, situations in which a review of all the pertinent facts will clearly establish that the male and female employees in question are not performing equal work on jobs which are equal in their requirements of skill, effort, and responsibility, and which are performed under similar working conditions. Where it is clear that this is so, the existence or *extent of a wage differential* between employees of opposite sexes *cannot of itself provide a basis for holding an employer liable* for violations under the provisions of section 6(d) of the Act." (Emphasis supplied.) (29 C. F. R. § 800.122)

On facts parallel to those herein, the Department of Labor in a Letter Opinion of June 3, 1964, reproduced in Appendix "C" hereto, ruled that no violation of the Act had occurred. In ignoring the Department of Labor's regulations and consistent rulings, which Petitioner cited to it, the Court of Appeals failed to accord the required deference to the contemporaneous interpretation of the Act by the agency charged with the duty to enforce it. *Udall v. Tallman,* 380 U. S. 1, 16 (1965), and the cases cited therein.

3. The decision of the Court of Appeals upsets the delicate legislative balance between the Equal Pay Act and Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, in dealing with discrimination based upon sex. The broader provisions of the Civil Rights Act are available to challenge a greater variety of types of discrimination than are covered under the Equal Pay Act. Thus, the Civil Rights Act generally prohibits all "unlawful employment practices," including ". . . to limit, segregate or *classify* . . . employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . ." (Emphasis supplied.) 42 U. S. C. § 2000e-2(a)(2). By finding a violation of the Equal Pay Act unless females are given the *opportunity* to perform a higher-paying *different* job, the performance of which requires additional skill, effort and responsibility, the Court of Appeals has vested private parties and the Department of Labor with the power to bring suit under the Equal Pay Act against an employer where no grievance has been filed by an employee or union and where no efforts at arbitration or conciliation have been made. Such powers have been denied under the Civil Rights Act, which establishes a meticulous and carefully defined path of concilia-

tion for potential litigants. Thus, under the Civil Rights Act, which was enacted one year after and with knowledge of the Equal Pay Act, no suit may be instituted without prior recourse to, and proceedings in, the Equal Employment Opportunity Commission, 42 U. S. C. § 2000e-5(e).[19] Furthermore, only aggrieved employees (42 U. S. C. § 2000e-5(e)), the Attorney General (42 U. S. C. § 2000e-6), and state agencies in cooperation with the Attorney General (42 U. S. C. § 2000e-8(b)), *but not the Department of Labor,* may initiate suit under the Civil Rights Act. The decision of the Court of Appeals would undermine the Civil Rights Act by encouraging the Department of Labor as well as private litigants to avoid the conciliatory proceedings of the E. E. O. C.[20]

4. The extent, if any, to which the Equal Pay Act and the Civil Rights Act are interrelated presents an important question of federal law which this Court should resolve, particularly in light of the significantliy different enforcement procedures established by the two statutes.[21] On March 2, 1970, this Court granted certiorari in *Phillips v. Martin Marietta Corp.,* No. 1058, Oct. Term, 1969. The

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19. The vital policy behind this administrative provision has recently been cogently summarized in *Bowe v. Colgate-Palmolive Co.,* 416 F. 2d 711, 719 (7th Cir. 1969):

> "This provision serves two important purposes. First, it notifies the charged party of the asserted violation. Secondly, it brings the charged party before the E. E. O. C. and permits effectuation of the Act's primary goal, the securing of voluntary compliance with the law."

20. If the Equal Pay Act had been intended to permit inquiries into deprivation of employment opportunities to perform unequal jobs, as is the effect of the decision of the Court of Appeals, there would have been no need to enact Title VII of the Civil Rights Act, which even the Court of Appeals conceded is "much broader than the Equal Pay Act" (Appendix B, p. A74).

21. The Court of Appeals, on its own motion and before decision, ordered reargument herein, *inter alia,* on the question: "To what extent does the Civil Rights Act of 1964 affect the construction of the Equal Pay Act of 1963" (Appendix B, p. A64).

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question presented in that case was "Whether the sex discrimination prohibition of § 703, Civil Rights Act of 1964, is violated by refusal to hire all women with preschool children while hiring men of the same class, where the distinction does not purport to be based on a bona fide occupational qualification." (Petition for Certiorari, p. 2) As such, both *Phillips* and this case present questions as to the illegality of allegedly sex-based discrimination, and decisions by this Court in these two cases would afford helpful guidelines in the interpretation, relationship, and enforcement of these two nationally significant statutes.[22]

5. The decision of the District Court, in refusing to accord Petitioner the right to a jury trial in this Equal Pay action, conflicts with the applicable decisions of this Court in *Ross v. Bernhard*, No. 42, Oct. Term 1969 and *Fleitmann v. Weisback State Lighting Co.*, 240 U. S. 27 (1916). The District Court's opinion demonstrates that its conclusion that a jury trial was not available herein was based on its distinction between an action for back pay, such as the present one, by the Secretary of Labor asserting the rights of reluctant employees, and an action by such employees in their own right.[23] Such artificial distinctions clearly do not survive this Court's decisions in the *Ross* and *Fleitmann* cases. *Ross*, for example, holds that in a stockholder's derivative suit brought on behalf of a reluctant corporation, the stockholder is entitled to a jury trial on any issue for which the corporation, were it suing on its own behalf, would be entitled to a jury trial. Since it is undisputed

22. In referring to the Equal Pay Act, the Court of Appeals wrote, "There are problems of construction which leap up from the reading of its language." (Appendix B, p. A72).

23. Although the Complaint is phrased in terms of restraining Petitioner from withholding any back wages due and resulting from the alleged violations, it is in fact, as the Court of Appeals recognized, an action for "the recovery of back pay." (Appendix B, p. A65).

here that individual employees would be entitled to a jury trial in independent actions for back pay brought under the Equal Pay Act,[24] Petitioner was entitled to a jury trial herein.[25]

CONCLUSION.

For the reasons given above, it is respectfully submitted that this Court should grant the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

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24. *Lewis v. Times Publ. Co.*, 185 F. 2d 457 (5th Cir. 1950); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273 (W. D. Pa. 1947).

25. Petitioner raised the jury trial issue before the Court of Appeals at the first time it became relevant, on petition for rehearing, after the Court had reversed the District Court's opinion in its favor. Indeed, had a jury trial been accorded to Petitioner, the Court of Appeals could not have disregarded the favorable factual findings, as it did those of the trial judge.

APPENDIX A.

Title VII of the Civil Rights of 1964.

SUBCHAPTER VI.—EQUAL EMPLOYMENT OPPORTUNITIES.

§ 2000e. Definitions.

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26: *Provided,* That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 716,

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(B) seventy-five or more during the second year after such date or fifty or more during the third year, or (C) twenty-five or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communi-

cation among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

Pub. L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662.

§ 2000e—1. Subchapter Not Applicable to Employment of Aliens Outside State and Individuals for Performance of Religious and Educational Activities of Religious Corporations, Associations, or Societies and Educational Institutions.

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution wth respect to the employment of individuals to perform work connected with the educational activities of such institution.

Pub. L. 88-352, Title VII, § 702, July 2, 1964, 78 Stat. 255.

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§ 2000e—2. **Unlawful Employment Practices—Employer Practices.**

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment Agency Practices.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor Organization Practices.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training Programs.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or Enterprises With Personnel Qualified on Basis of Religion, Sex, or National Origin; Educational Institutions With Personnel of Particular Religion.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer

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for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-Action or Communist-Front Organizations.

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National Security.

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or Merit System; Quantity or Quality of Production; Ability Tests; Compensation Based on Sex and Authorized by Minimum Wage Provisions.

(h) Notwithstanding any other provision of this subchapter; it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or na-

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tional origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Businesses or Enterprises Extending Preferential Treatment to Indians.

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential Treatment Not to Be Granted on Account of Existing Number or Percentage Imbalance.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex,

or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub. L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255.

§ 2000e—3. Other Unlawful Employment Practices—Discrimination for Making Charges, Testifying, Assisting, or Participating in Enforcement Proceedings.

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Printing or Publication of Notices or Advertisements Indicating Prohibited Preference, Limitation, Specification, or Discrimination; Occupational Qualification Exception.

(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such

an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

Pub. L. 88-352, Title VII, § 704, July 2, 1964, 78 Stat. 257.

§ 2000e—4. Equal Employment Opportunity Commission —Creation; Political Representation; Appointment; Term; Vacancies; Chairman, Duties; Vice Chairman, Acting Chairman; Personnel.

(a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party, who shall be appointed by the President by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a team of four years, and one for a term of five years, beginning from July 2, 1964, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and shall appoint, in accordance with the civil

service laws, such officers, agents, attorneys, and employees as it deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the Classification Act of 1949, as amended. The Vice Chairman shall act as Chairman in the absence or disability of the Chairman or in the event of a vacancy in that office.

Exercise of Powers During Vacancy; Quorum.

(b) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

Seal; Judicial Notice.

(c) The Commission shall have an official seal which shall be judicially noticed.

Reports to Congress and the President.

(d) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

Principal and Other Offices.

(e) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

Powers of Commission.

(f) The Commission shall have power—

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(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 2000e—5 of this title, or for the institution of a civil action by the Attorney General under section 2000e—6 of this title, and to advise, consult, and assist the Attorney General on such matters.

Legal Representation.

(g) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court.

Cooperation With Other Departments and Agencies in Performance of Educational or Promotional Activities.

(h) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

Personnel Subject to Section 118i of Title 5.

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 118i of Title 5, notwithstanding an exemption contained in such section.

Pub. L. 88-352, Title VII, § 705(a)-(d), (f)-(j), July 2, 1964, 78 Stat. 258, 259.

§ 2000e—5. Enforcement Provisions—Charges by Persons Aggrieved or Member of Commission; Copy of Charges to Respondents; Investigation of Charges; Conference, Conciliation, and Persuasion for Elimination of Unlawful Practices; Prohibited Disclosures; Use of Evidence in Subsequent Proceedings; Penalties.

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that

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the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

State or Local Enforcement Proceedings; Notification of State or Local Authority; Time for Filing Charges With Commission; Commencement of Proceedings.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes

of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Same; Notification of State or Local Authority; Time for Action on Charges by Commission.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Time for Filing Charges After Occurrence of Unlawful Practices or Termination of State or Local Enforcement Proceedings; Filing of Charges by Commission With State or Local Agency.

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or

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local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil Actions for Prevention of Unlawful Practices; Legal Representation; Commencement of Action Without Payment of Fees, Costs or Security; Intervention by Attorney General; Stay of Federal Proceedings.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

Jurisdiction and Venue of United States Courts.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

Injunctions; Appropriate Affirmative Action; Reinstatement, Hiring, Back Pay; Reduction of Back Pay by Interim Earnings or Amount Earnable; Limitations on Judicial Orders.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay

otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e—3(a) of this title.

Provisions of Sections 101 to 115 of Title 29 Not Applicable to Civil Actions for Prevention of Unlawful Practices.

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

Proceedings by Commission to Compel Compliance With Judicial Orders.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e) of this section, the Commission may commence proceedings to compel compliance with such order.

Appeals.

(j) Any civil action brought under subsection (e) of this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

Attorney's Fee; Liability of Commission and United States for Costs.

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party,

other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Pub L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259.

§ 2000e—6. Civil Actions by the Attorney General—Complaint.

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

Jurisdiction: Three-judge District Court for Cases of General Public Importance: Hearing, Determination, Expedition of Action, Review by Supreme Court; Single-Judge District Court: Hearing, Determination, Expedition of Action.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a

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request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest

practicable date and to cause the case to be in every way expedited.

Pub. L. 88-352, Title VII, § 707, July 2, 1964, 78 Stat. 261.

§ 2000e—7. Effect on State Laws.

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Pub. L. 88-352, Title VII, § 708, July 2, 1964, 78 Stat. 262.

§ 2000e—8. Investigations—Examination and Copying of Evidence Related to Unlawful Employment Practices.

(a) In connection with any investigation of a charge filed under section 2000e—5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

Cooperation With State and Local Agencies Administering State Fair Employment Practices Laws; Utilization of Services; Reimbursement; Agreements and Recission of Agreements.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose,

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utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements and under which no person may bring a civil action under section 2000e—5 of this title in any cases or class of cases so specified, or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

Execution, Retention, and Preservation of Records; Reports to Commission; Training Program Records; Appropriate Relief From Regulation or Order for Undue Hardship.

(c) Except as provided in subsection (d) of this section, every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an ap-

prenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which such applications were received, and shall furnish to the Commission, upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may (1) apply to the Commission for an exemption from the application of such regulation or order, or (2) bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief.

Records Under State Fair Employment Practice Laws; Notations to Reflect Differences in Coverage or Enforcement Between State and Federal Law; Reports to Federal Agencies Under Executive Orders as Dispensing With Reports to Commission.

(d) The provisions of subsection (c) of this section shall not apply to any employer, employment agency, labor organization, or joint labor-management committee with respect to matters occurring in any State or political subdivision thereof which has a fair employment practice law during any period in which such employer, employment agency labor organization, or joint labor-management committee is subject to such law, except that the Commission

may require such notations on records which such employer, employment agency, labor organization, or joint labor-management committee keeps or is required to keep as are necessary because of differences in coverage or methods of enforcement between the State or local law and the provisions of this subchapter. Where an employer is required by Executive Order 10925, issued March 6, 1961, or by any other Executive order prescribing fair employment practices for Government contractors and subcontractors, or by rules or regulations issued thereunder, to file reports relating to his employment practices with any Federal agency or committee, and he is substantially in compliance with such requirements, the Commission shall not require him to file additional reports pursuant to subsection (c) of this section.

Prohibited Disclosures; Penalties.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year. Pub. L. 88-352, Title VII, § 709, July 2, 1964, 78 Stat. 262.

§ 2000e—9. Investigatory Powers—Examination of Witnesses; Production of Evidence.

(a) For the purposes of any investigation of a charge filed under the authority contained in section 2000e—5 of this title, the Commission shall have authority to examine

witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation.

Jurisdiction for Issuance of Compliance Orders; Attendance of Witnesses or Production of Evidence Out of State.

(b) If the respondent named in a charge filed under section 2000e—5 of this title fails or refuses to comply with a demand of the Commission for permission to examine or to copy evidence in conformity with the provisions of section 2000e—8(a) of this title, or if any person required to comply with the provisions of section 2000e—8(c) or (d) of this title fails or refuses to do so, or if any person fails or refuses to comply with a demand by the Commission to give testimony under oath, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, have jurisdiction to issue to such person an order requiring him to comply with the provisions of section 2000e—8(c) or (d) of this title or to comply with the demand of the Commission, but the attendance of a witness may not be required outside the State where he is found, resides, or transacts business and the production of evidence may not be required outside the State where such evidence is kept.

Petition for Order to Modify or Set Aside Demand; Specification of Grounds; Waiver of Objections.

(c) Within twenty days after the service upon any person charged under section 2000e—5 of this title of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 2000e—8(a) of this title, such person may file in the district court of the United States for the judicial district in which

he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this subchapter or with the limitations generally applicable to compulsory process or upon any constitutional or other legal right or privilege of such person. No objection which is not raised by such a petition may be urged in the defense to a proceeding initiated by the Commission under subsection (b) of this section for enforcement of such a demand unless such proceeding is commenced by the Commission prior to the expiration of the twenty-day period, or unless the court determines that the defendant could not reasonably have been aware of the availability of such ground of objection.

Petition, in Proceedings by Commission, for Order to Modify or Set Aside Demand.

(d) In any proceeding brought by the Commission under subsection (b) of this section, except as provided in subsection (c) of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.

Pub. L. 88-352, Title VII, § 710, July 2, 1964, 78 Stat. 264.

§ 2000e—10. Posting of Notices; Penalties.

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to

employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

Pub. L. 88-352, Title VII, § 711, July 2, 1964, 78 Stat. 265.

§ 2000e—11. Veterans' Special Rights or Preference.

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

Pub. L. 88-352, Title VII, § 712, July 2, 1964, 78 Stat. 265.

§ 2000e—12. Regulations; Conformity of Regulations With Administrative Procedure Act; Reliance on Interpretations and Instructions of Commission.

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the

Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

Pub. L. 88-352, Title VII, § 713, July 2, 1964, 78 Stat. 265.

§ 2000e—13. Application to Personnel of Section 111 of Title 18.

The provisions of section 111, Title 18, shall apply to officers, agents, and employees of the Commission in the performance of their official duties.

Pub. L. 88-352, Title VII, § 714, July 2, 1964, 78 Stat. 265.

§ 2000e—14. Special Study by Secretary of Labor; Report to Congress.

§ 2000e—15. Presidential Conferences; Acquaintance of Leadership With Provisions for Employment Rights and Obligations; Plans for Fair Administration; Membership.

The President shall, as soon as feasible after July 2, 1964, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be

affected by this subchapter to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this subchapter when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this subchapter.

Pub. L. 88-352, Title VII, § 716(c), July 2, 1964, 78 Stat. 266.

APPENDIX B.

Opinion of the United States District Court for the District of New Jersey Filed on April 26, 1966.

COHEN, *District Judge:*

The sole issue presented here is whether defendant is entitled to a jury trial.

Examination of the pleadings discloses that the complaint was filed by the United States Secretary of Labor, under Section 17 of the Fair Labor Standards Act of 1938, as amended, 29 U. S. C. 201 *et seq.*, seeking a permanent injunction against defendant Wheaton Glass Co., a New Jersey corporation, restraining it from violating the Act by reason of its alleged discrimination against female employees, in withholding payment of wages due them, in their performance of work of the same character as that performed by male employees. The complaint, under the Act, is couched in terms appropriate to a prayer in equity.

In its answer defendant denies that it violated the Act, or that it engages in the conduct alleged against it in violation of the provisions of section 15(a)(1) and (2). With its answer, it served a timely demand for a trial by jury, which the plaintiff presently moves to strike.

Plaintiff contends that the authority to bring this action was conferred upon him by 29 U. S. C. 217, as amended in 1961, and that such proceeding is by its nature an equitable one not requiring a jury, nor is provision made in the statute for trial by jury.[1] Further, that while the

1. Section 17 of the Fair Labor Standards Act, "Injunction proceedings," (29 U. S. C. 217) as amended in 1961, provides in pertinent part: "The district courts, . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter . . ."

Seventh Amendment to the United States Constitution preserves the right to trial by jury, as at Common Law, the present case is not one cognizable at Common Law, hence Congress' failure to provide for trial by jury was not unconstitutional.

Defendant counters and presses for a jury trial, asserting that the phrasing of the complaint in terms of equitable relief does not change the real character of the judgment sought, it being in reality a suit for a money judgment. This being so, both legal and factual issues are involved which entitle it to a jury trial.

The precise issue is not without some difficulty. A first impression comes easily. If the proceeding is in fact an action in debt, as in assumpsit, for money damages representing employee-wages improperly withheld in violation of the Fair Labor Standards Act, supra, then legal issues would be presented as traditionally warranted trial by jury at common law. Such is the proposition advanced by defendant, relying upon *Dairy Queen, Inc. v. Wood,* 369 U. S. 469 (1962); *Beacon Theatres v. Westover,* 359 U. S. 500 (1959); *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.,* 294 F. 2d 486 (5 Cir. 1961), and *Olearchick v. American Steel Foundries,* 73 F. Supp. 273 (D. C. W. D. Pa. 1947), among others.

It is true that employees may bring jury actions under Section 16 of the Act for wages. However, when the Secretary of Labor brings an action under Section 17 for an injunction to restrain certain conduct allegedly in violation of the Act, he is invoking a statutory remedy nonexistent at common law and hence not triable as of right before a jury. Therefore, such action is not within the purview of the Seventh Amendment. In the one instance, the employee suing under Section 16 is pursuing a private remedy in an action at law as provided by the Act. But,

when the Secretary of Labor brings an action under Section 17 for restraint, primarily equitable in nature, the legal action by the individual is preempted. That the employee may ultimately reap the reward by the incidental receipt of wages wrongfully withheld does not convert the equitable nature of the action into a legal one triable as of right by jury. Unlike the employee who seeks enforcement of a private right, the Secretary represents the sovereignty of the United States in protection of the public interest by enjoining violations of the Act. *Wirtz v. Jones,* 340 F. 2d 901 (5 Cir. 1965).

While the Federal Rules of Civil Procedure provide for the merger of claims formerly recognized either in law or equity, the right to a trial by jury was neither enlarged nor diminished thereby.[2] If it existed, it is preserved by the Seventh Amendment; if it did not, then it must be specifically conferred by statute. The Fair Labor Standards Act makes no provision for trial by jury where the action is brought by the Secretary of Labor to enjoin violations and in addition thereto, to restrain employers from unlawfully withholding wages in violation of the Act. *Wirtz v. Jones,* supra.

The *Dairy Queen* case cited by defendant is readily distinguishable. There, a private corporation sought equitable relief, but also sought a money judgment for breach of contract. The Supreme Court pointed out that the guise of the action did not control on the question of demand for trial by jury; rather that there, one of the central actions was for a money judgment in debt, warranting a jury trial on the legal issues, although other relief which was equitable in nature, was sought. In the *Beacon Theatres* case, jury trial was provided under the *Sherman Anti-Trust Act,* but

2. *Ettleson v. Metropolitan Life Insur. Co.*, 137 F. 2d 62, 65 (3 Cir. 1943), cert. den. 320 U. S. 777 (1943); *Fitzpatrick v. Sun Life Assurance Co.,* 1 F. R. D. 713, 715 (D. C. N. J. 1941).

anticipating suit for treble damages, a Declaratory Judgment action was brought. The Supreme Court held that the trial court could not try both legal and equitable issues without a jury, where properly demanded. *Thermo-Stitch* and *Olearchick,* supra, are to like effect. The case of *Damsky v. Zavatt,* 289 F. 2d 46 (2 Cir. 1961), cited by defendant, is inapposite. In that case, the demands for jury trial by the defendants, husband and wife, were stricken by the trial court. The Appellate Court reversed in part, holding that the Government's suit against the husband for taxes, penalties and interest for which he was solely liable was a suit in debt, as at common law, and within the Seventh Amendment affording him a jury trial as of right; but that the suit against the wife to set aside an alleged fraudulent conveyance of her realty, in order to impress liens and ultimately effect judicial sale to satisfy such liens, was equitable in nature, hence no trial by jury as of right under the Seventh Amendment. In *Damsky,* it was pointed out that historically an action in debt lay in England for the collection of taxes, carrying with it the right to a jury trial wholly aside from any subsequent statute in this country. The fact that the United States was a party, as distinguished from a debt action between private citizens, was considered of no moment. However, unlike *Damsky,* the instant case is not one in debt, nor is there a blending of both legal and equitable issues such as might invoke the rule of *Dairy Queen,* stating i.e. that the presence of equitable issues could not foreclose jury trial where properly demanded on legal issues.

The case most persuasive as being dispositive of the present issue is *Wirtz v. Jones,* already cited, an opinion of the Fifth Circuit by Judge Anderson, temporarily assigned from the Second Circuit. There, the pertinent legislation and cases construing it on the same issue of jury trial are

carefully analyzed. The language at page 904 is particularly appropriate here, and seems to go to the heart of the matter:

> "In the instant case, however, the purpose of the injunction to restrain the withholding of wages due is not to collect a debt owed by an employer to his employee but to correct a continuing offense against the public interest."

The contention of defendant that the Secretary of Labor is seeking, in effect, a money judgment entitling it to a jury trial is best refuted by the language of the Supreme Court in *Labor Board v. Jones & Laughlin,* 301 U. S. 1 (1937) at pages 48-49:

> "Respondent complains that the Board not only ordered reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period. . . . It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' The Amendment thus preserves the right which existed under the common law when the Amendment was adopted (citing authority). Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law (citing authority). It does not apply where the proceeding is not in the nature of a suit at common law (citing authority).
>
> "The instant case is not a suit at common law or in the nature of a such a suit. The proceeding is one unknown

to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit." (Parentheses supplied.)

This language is unequivocal and is manifestly binding on this Court. Congress entrusted to the Secretary of Labor the protection of such public interest, not the enforcement of private rights in debt. In the administration and enforcement of the Act by the Secretary, Congress did not provide in the statute for the charged party to have a right to trial by jury, nor did such right exist at Common Law. Therefore, there is no absolute right to a trial by jury in the instant case. The demand for a jury trial must be denied and the motion of plaintiff granted.

Counsel shall submit an appropriate order.

MITCHELL H. COHEN,
Mitchell H. Cohen,
Judge, United States District Court.

Order of the United States District Court for the District of New Jersey Dated May 2, 1966.

Plaintiff having moved this Court for an Order to strike the demand for a jury trial filed in this action, and to transfer the case to the non-jury calendar, and said motion having come on to be heard before me on March 18, 1966, and Mary E. Cerbone, Attorney, United States Department of Labor, of counsel, having appeared in support of said motion of the plaintiff, and Harold E. Kohn, Esq., of counsel, having appeared in opposition to plaintiiff's said motion, and argument having been heard and due deliberation having been had,

Now, on motion of John A. Hughes, Regional Attorney, United States Department of Labor, attorney for plaintiff, it is

ORDERED, that the plaintiff's motion to strike the demand for a jury trial be and the same is hereby granted, and it is further

ORDERED, that the Clerk of the Court be directed to transfer this case to the non-jury calendar of this Court.

s/ MITCHELL H. COHEN,
Mitchell H. Cohen,
Judge, United States District Court.

Dated: Camden, N. J., May 2nd, 1966.

Order of Amendment of the United States District Court for the District of New Jersey Dated May 9, 1966.

Plaintiff's Motion in this matter to strike defendant's Demand for Jury Trial having been granted by Order dated May 2, 1966;

And it appearing upon the application of defendant that said Order involves a controlling question of law as to which there may exist substantial ground for difference of opinion, and that an interlocutory appeal may materially advance the ultimate termination of the litigation;

Now Therefore, it is on this 9th day of May, 1966, Ordered that the Order of this Court entered May 2, 1966, striking Demand for Jury Trial is hereby amended to include certification that it involves a controlling question of law as to which there may exist substantial ground for difference of opinion, and that an immediate appeal from such Order may materially advance the ultimate termination of this litigation.

MITCHELL H. COHEN,
Mitchell H. Cohen,
Judge, United States District Court.

Order of the United States Court of Appeals for the Third Circuit Dated June 9, 1966.

Present: KALODNER and HASTIE, *Circuit Judges*, and WRIGHT, *District Judge*.

Upon consideration of the application by defendant in the above-entitled case for leave to appeal from the interlocutory order of May 2, 1966, which order granted plaintiff's motion to strike defendant's demand for a jury trial, and the amendment of May 9, 1966, whereby the District Judge included a certification that the May 2 order involves a controlling question of law as to which there may exist substantial ground for difference of opinion and that an immediate appeal from such order may materially advance the ultimate termination of the litigation and of the answer by plaintiff in opposition,

It is ORDERED that leave to appeal pursuant to 28 U. S. C. Sec. 1292(b) be and it hereby is denied.

By THE COURT,

KALODNER, *Circuit Judge*

June 9, 1966.

Opinion of the United States District Court for the District of New Jersey Filed on May 1, 1968.

COHEN, *District Judge:*

The plaintiff, W. Willard Wirtz, Secretary of the United States Department of Labor, commenced this action under *Section* 17 of the *Fair Labor Standards Act of 1938*, as amended,[1] and supplemented by the *Equal Pay Act of*

1. 29 U. S. C. § 201 *et seq.*

1963,[2] against defendant Wheaton Glass Co., a New Jersey corporation, seeking to enjoin it from allegedly violating the equal pay provisions of the latter *Act*. The gravamen of the complaint is that defendant is violating the *Act* by maintaining a wage rate disparity based upon *sex discrimination* between the male and female employees in its glass container inspecting and packaging department, in Millville, New Jersey. Restraint is sought, also, against the withholding of any back wages found to be due by reason of such alleged violation.[3]

Plaintiff alleges that the defendant violates the *Act* by discriminating between men and women in the position of "selector-packer" of its glass bottle products on the basis of sex. He complains that in this job men and women perform equal work under similar working conditions, but receive unequal pay.

While the defendant admits that the employees involved are covered by the *Fair Labor Standards Act*, it denies any violation thereof. It contends that the trial

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2. 29 U. S. C. § 206(d)(1), Pub. L. 88-38, § 3, 77 Stat. 56, provides:

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex, by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

3. Section 206(d)(3) provides as follows:

"For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter."

testimony amply demonstrates substantial differences in performance between the male and female selector-packers; accordingly, not only has the plaintiff failed to carry his required burden of establishing *sex* as the basis for the hourly wage differential of 21½ cents ($2.355 for males and $2.14 for females), but that he has also failed in his burden of foreclosing "any other factor other than sex" as a basis for the wage differential.

The factual dispute between the parties involves the question of how much, if any, of the work performed by male selector-packers differs substantially from that performed by the females. There is disagreement as well on the legal meaning to be attributed judicially to the phrase "equal work" as used in the *Act*, and whether the defendant's wage rate differential is based upon a factor or factors other than sex, as provided by the *exceptive* language of the *Act*.[4] Substantially, such are the contentions of the parties.

Plaintiff's approach to these issues is that, as to the burden of proof under the *Act*, he is not required to prove that sex is the *sole* basis for the wage differential, for the word "sole" is used nowhere in the *Act*. Furthermore, if the plaintiff is to be confined to proof of sex as the *sole* factor, an employer could handily subvert the equal pay provisions by any ingenious increment of job duties. He recognizes that while the *Act* provides *exceptions*, these are directed to systems, patterns or distinctive classifications, such as seniority, merit, quantity or quality of product,[4] and not to self-serving, unrealistic, unsubstantial or inconsequential incidents in prime job content and performance. The plaintiff maintains that the intention of Congress was not to afford an employer opportunity to continue a wage

4. 29 U. S. C. § 206(d)(1)(iv), ibid. n. 2.

differential based on sex simply by utilizing artificial classification or guise on the pretense of complying with the *Equal Pay Act.* He contends that the legislative history of the *Act,* together with the departmental regulations promulgated thereafter, as well as the decisions construing them, support his position. He stresses the fact that occasional performance by males of *other tasks* enumerated herein, which are merely incidental to the overall job cycle, and for which females may be inadequate, as well as *other factors* relied upon by the defendant, hereinafter, are not such bases under the *Act,* as will convert otherwise equal work into unequal. If not so, he argues, the equality in wage treatment of both sexes expressly sought to be accomplished by Congress could be defeated by the merest pretense of performance differences between the sexes.

Defendant, in advancing justification both factually and legally for the wage rate differential between men and women, claims that the proofs at trial clearly establish essential and substantial differences in job performance; and that these differences are not based upon sex, nor devised to secure an economic advantage. Rather, they are necessary and proper, since the complete job cycle and content of its *unique* business demand a realistic distinction in *job performance requirements* and, thus, justify the difference in wage treatment.

In light of the diametrically opposed factual and legal contentions of the parties, a history of the defendant's operations and an analysis of the trial proofs seem essential both for judicial choice of fact, as well as for interpretation and application of the law.

The trial consumed 16 non-consecutive days, prior to which I visited the defendant's plant in order to gain some familiarity with the technical aspects of the job performed by the selector-packers. A similar visit was made at the

conclusion of the trial, in order to correlate the testimony to the visual operation.

Defendant is one of the largest manufacturers of glass containers in this Country. Its principal plant occupies an area approximating several metropolitan city blocks. It carries an hourly rate employee payroll, as distinguished from administrative and salaried, annually approximating eleven and a half million dollars. It engages some 2,200 hourly employees who are represented in collective bargaining by the Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, Local 219. For the purposes of this case, however, we need not attempt exposition of all the facets of the defendant's operation nor of the duties of all its employees. It will suffice to state that the two principal components of the defendant's plant are the "hot end," furnaces where the glassware is manufactured, and the "cold end" where it is inspected, selected and packaged. Our concern is solely with a category of employees denominated by the defendant as "selector-packers" located in the "cold end."

It is at the emission point, where the bottles, jars and other containers leave the "hot end" on a lehr[5] and move forward on its conveyor belt to the "cold end," that the selector-packers are engaged. It is here, on a long, wide conveyor table, the belt of which moves at the approximate rate of 14 inches per minute past the male and female selector-packers, that containers are picked up by hand and visually inspected for defects. Defective bottles (cullet) are rejected and discarded into a waste container. Those selected are packed in cardboard cartons on a "buck," or stand, within arm's reach and lifted onto an adjacent con-

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5. A "lehr" is a long oven or furnace on which glassware is annealed (heated, then cooled, or tempered) as it travels through on a continuous belt.

veyor, or stacked aside, for removal to the Quality Control or Inspection Department.

In addition to the selector-packers, the defendant employs, in its packing department, some 37 base rate employees known as "snap-up" boys, who receive $2.16 per hour, 2 cents more than the females. Their function is that of the all-around "handy man." They act as relief selector-packers during the lunch period and other "breaks," so that the lehr is continuously manned to sustain its output and to prevent spillage and breakage. They also lift heavy or bulky cartons for women and perform whatever miscellaneous physical labor may be required of them on a given job at a particular time. Their higher rate is not challenged.

In addition to selecting and packing, along with females at the lehr, other duties of the male selector-packers are as follows: (1) to lift anything weighing approximately in excess of 35 pounds; (2) to lift any bulky or unhandy cartons, regardless of weight; (3) to stack full cartons on wooden pallets, a process known in the trade as "palletizing," in the area of the related lehr; (4) to tie securely stacks of cartons on the pallets; (5) to move and place fully loaded pallets for further disposition; (6) to carry, move, place and stack empty pallets for later use; (7) to operate hand trucks in the areas of the lehrs; (8) to carry, move, position, install, set-up and adjust portable roller conveyors and packing "bucks" (waist high stands or racks positioned next to the moving conveyor, which hold empty cartons for filling); (9) to collect, carry and dump trays and tubs of cullet (rejected glassware); (10) to sweep and clean all work areas in and around the aisles near the lehrs, and to prepare for job changes; (11) to cut glass stoppers with a diamond saw at the lehrs; (12) to fit and attach metal clips to glass containers at the lehrs; (13) to unjam overhead carton conveyors and automatic cullet belts; (14) to occasionally reinspect, repack and restack delivered glassware

on customers' premises; (15) to locate certain glassware in defendant's warehouse, which at times may involve climbing over stacks of palletized ware; and (16) to work, if necessary, in excess of 10 hours in any one work day and in excess of 54 hours in any one work week.[6]

The females perform little or none of the foregoing duties. As of October 1, 1967, they were 230 in number.

Such then, in general outline, is the factual picture of the operations of the department in question, as well as some of the more specific duties of the selector-packers, as established by the testimony. In the development of its case, plaintiff presented 33 witnesses, among whom were 25 females and, out of a complement of 276, only 5 male selector-packers. Of the latter group, one is the husband of a female selector-packer; another is a union shop steward, admittedly seeking wage upgrading for the females; and two other males who were briefly employed by defendant, but who at the time of trial were no longer so employed.

In turn, the defendant presented six witnesses, most of whom represented management personnel.

It should be observed, particularly in a non-jury case, that the crucial issue of credibility requires careful scrutiny, analysis and assessment of the testimony of each and every witness. In doing so, it seems obvious that those witnesses presented by the plaintiff, of necessity, understandably provided a limited view, circumscribed by their time and work areas, while those of the defendant presented a broader view of the overall scope of the operation of the entire department. Furthermore, it may be mentioned that the tempering influence of self-interest, as it might understandably affect each witness, has been taken into consideration.

6. A "double shift" refers to 2 consecutive tours of duty—sixteen hours or any portion thereof over 10 hours. From January 1, 1966 through September 30, 1967, there were 2,952 instances when men worked "double shifts" which women, under New Jersey Law, are prohibited from doing. See n. 14, post.

Further examination of the evidence reveals that prior to 1956, the Bottle Inspection Department was staffed solely by male employees, consisting of selector-packers and "snap-up" boys who performed the total job. The advent in 1956 of the distaff side of this department was precipitated by a precarious local labor market, upon which the defendant was and is totally dependent. The shortage of available men in the Millville labor area[7] required the defendant to resort, for the first time, to the employment of females as an adjunct to its depleted male labor force. At this time, the Union adopted the position that a new job must be created for females different from that of males. It was to be confined to light-duty work, comparable to other light duty provided for female employees throughout the defendant's plant. A further condition was that no bulky or heavy lifting of any carton over 35 pounds[8] was to be permitted, and that no male selector-packer was to be displaced by a female, except to fill a vacancy resulting from death or resignation. The parties agreed and, accordingly, there was carved out of the total job of selector-packer, a segment heretofore performed exclusively by the male; then there was created a new role of female selector-packer to whom there was assigned lighter duties at the lehr, consisting solely of selecting and packing. So that the total job in the Bottle Inspection Department was thereupon divided

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7. We are not here confronted with a large metropolitan community. Rather, a small rural area with a county population of about 100,000, of which the City of Millville has 20,000. *New Jersey Legislative Manual,* 1967.

8. From January 1964 to September 1967, the percentage of jobs in excess of 35 lbs. was 30.6 and 85.6 percent of the cartons weighing over 35 lbs., weighed over 40 lbs. 186,000 cartons are used on a weekly average. 200 cartons in excess of 35 lbs. are lifted on an average by each man each week. There was some testimony that some females lifted more than 35 lbs. on occasion and that they did not clearly understand that there was a rule.

into three segments: one, that of the versatile male selector-packer; two, that of the female performing light duty and three, that of the "snap-up" boy performing miscellaneous labor. While it is true that some of the duties performed by the male selector-packers can be and are performed by the "snap-up" boys, nevertheless, the defendant must use its male selector-packers as well for these duties as a matter of operational and economic necessity, in order that the limited performance of the females may be supplemented to complete the total job cycle. Consistent with economy, it would be unreasonable to insist that the defendant should add to and maintain otherwise idle base rate men to perform all duties (other than selecting and packing), as occasions demand and as presently performed by male selector-packers.

Turning now to the wage differential itself, we find that at the time of the creation of the job of female selector-packer in 1956, both the defendant and the union agreed upon a 10 percent differential rate between the men and the women. In so doing, the parties took into consideration the limitations of effort, knowledge, skill and responsibility of the new job, as well as comparable jobs throughout the plant, community and industry. As with the male selector-packers and the supporting "snap-up" boys, no precise job evaluation enumerating duties was ever established as to this particular job. It was determined by the parties to be only part of an existing job. The wage rate for the female continued to be, and still is, 10 percent below that set for the male. When the 1962-65 labor contract was approaching the end of its term, and renewal negotiations were in progress between the defendant and the union, the question of the wage differential came into focus in light of the interim passage of the *Equal Pay Act*, the provisions of which did not apply to the defendant until the 1962-65

labor agreement expired. Not once, during all the bargaining negotiations since the 1956 employment of female selector-packers, did the difference in wages become a collective bargaining issue. On the contrary, the 10 percent differential was accepted by the females through their union bargaining representatives without question and did not rear its head until after the passage of the Act, when it was raised for the first time during the course of a political campaign for the election of the union president. Rather significantly, there was testimony from which it may be deduced that the status was accepted, i. e., light duty and corresponding wage were acquiesced in by all the parties to the labor agreement. A union representative admitted that he complained to defendant, when a female selector-packer was allegedly assigned to perform duties involving cullet removal, heavy lifting and cleaning around the lehr, protesting that this was work for which she was not employed.

Defendant continued to employ women in the Bottling Department but, because of their limited utility, not to its entire satisfaction. It became evident that by reason of its dependence upon males for the performance of the total job cycle, and not merely for some supposed economic advantage, the existing employment of females did not provide the requisite flexibility, so crucially essential to its singular operation. Just as soon as the labor market permitted, hiring reverted solely to males, although women were abundantly available and it would have been economically more feasible to employ them, especially since their wage rate was 10 percent lower than that of the men. The uncontradicted testimony presented by the defendant was that not one female was hired between August 12, 1962 and May 12, 1966, a period of almost four years, during which time 1,279 males were hired. This fact significantly and

realistically substantiates the theory posited by defendant that the element of flexibility in the intelligent use of its labor force has always been the key to the efficient functioning of its unique industrial plant. And it is strongly corroborative of the rationale advanced, that defendant is almost completely dependent upon use of the more versatile males in its selecting and packing department, not as a preference alone but, rather, as a matter of sheer economic necessity and sound industrial management. Further illustration of such dependence upon the ever shifting local labor pool is the fact that defendant was compelled to resort to the employment of females once again in May, 1966, when the male labor market had been exhausted. So, also, is the labor problem pointed up in an industrial enterprise of this magnitude by defendant's Summer employment of untrained college students, who were and still are phased into its operations as a temporary aid in meeting its ever present need for job flexibility. While it is true that to some extent, all employers are dependent upon the supply of labor, be it male or female, be it for reasons of geography or season, nevertheless, that is not to say that all employees, irrespective of sex, can fulfill all the requirements of certain industrial jobs of a particular employer.

Outstanding, among all the witnesses, was Thomas B. Hinckley, Jr., the defendant's General Factories Manager. He provided not only factual testimony but, based upon his exceptional background, broad training and extensive experience, profound expertise regarding the established standards, customs and practices of the time-honored glass container industry, so rich in its early history of individual glass blowing and down to the modern assembly line. Hinckley has been in the glass container business for forty years with vast experience both in its production and management phases and reached his present position with the

defendant company, literally arising from the ranks.[9] He is truly one of the giants of the industry and seldom has this Court had the benefit of such expert and credible testimony. He provided great insight into the singularity of the defendant's operation which he termed "unique," in that it has to be tailored to fit the diversified demands made by its market. This necessitates manual handling and visual inspection at the lehrs, in contrast to the use of automatic

9. At the age of 14, during and after graduation from high school, he worked in the old Chicago Heights Bottle Works, Illinois, as a "snap-up" boy. He carried and cleaned iron and molds, and worked as a tray-boy in the packing house, and as a tank shearer until December, 1931, when he became an Apprentice Mold Maker. Thereafter, he became a Journeyman and engaged in union activities. He remained here through the company's change to the Kimball Division of the Owens-Illinois Glass Company until 1941, when he left to go to the defendant's plant as a Journeyman Mold Maker, and served in that capacity until 1955. During this period, he was Chairman of the Union Negotiating Team and held that position for 15 years. In June, 1955, he became General Foreman of the New Mold Department and Mold Production Department for a year, then was appointed Bottle Production Manager of the Wheaton Glass Companies. The latter position placed him in charge of all activities of the "hot end" manufacturing of glass containers. On April 10, 1959, he became Plant Manager of T. C. Wheaton Glass Company and Wheaton Glass Company, which merged a few years ago, and is now known as Plants No. 1 and No. 2 of the Wheaton Glass Company. His present position is General Factories Manager. For years he has been a staff member of the Glass Container Industry Research Corporation, which consists of all major glass container manufacturers in the United States. Its purpose is to improve all operations in the industry through research of furnace treatment, designing, engineering, packaging and other things calculated to improve and preserve the industry against inroads from plastics, rubber, tin, aluminum and other types of container manufacturers. He is also a staff member of the Foreign Division Technical Staff of the Wheaton Glass Company, which involves search for and exchange of knowledge and technical "know-how," with glass-container companies in Europe and South America. His interests and activities on behalf of Wheaton, and the Industry itself, have taken him into the fields of planning, designing, staffing and managing of other plants as well as the inspection, study and research of all the operations in all the major glass-container manufacturing companies throughout the United States, Europe and South America.

inspection, selection and packaging machinery by the modern glass industry. The latter is principally engaged in the manufacture of standard items, such as pharmaceuticals, cosmetic, mayonnaise, peanut butter, and baby food jars, and beer, soda, and milk bottles, and the like, requiring little or no change in size, color, design, quantity or quality. The defendant's plant is the only one in the industry capable of manufacturing customized products of nine different sizes,[10] types and colors within twenty-four hours of a customer's order, a feat unmatched by any other company in the United States.

Thus, distinction must be drawn between a "job shop," such as the defendant's, and standard plants where automatic equipment makes possible the exclusive employment of women as selector-packers. Because of the defendant's peculiar operations, it is impossible for it to manufacture its particular kinds of products by employing modern industry methods. This is further demonstrated by the fact that the defendant owns the General Mold and Machinery Company, a manufacturer of automatic inspection and conveying equipment, which it sells to the glass industry. The defendant has available in its own plants more than $100,000 worth of this type equipment which it seldom, if ever, uses because it is impossible to do the job required in view of the varying and irregular sizes and shapes of its containers. Despite extensive inquiry by the defendant, no other company has been able to produce a machine that can be utilized by it, at a cost less than prohibitive, since the potential market for such a machine would be limited solely to the defendant. It seems appropriate to observe that the defendant would avail itself of the wonders of this Age of Automation, if it could do so, but it cannot. Conse-

10. The size of the ware ranges from ½" high x ½" in diameter to 1' high x 6" in diameter.

quently, the defendant has been and is compelled to resort to well established, old-fashioned methods of individual physical inspecting, selecting and packing at the lehrs, all of which requires utmost flexibility in the deployment and maximum utilization of its male labor force. In meeting the broadly diversified demands of its customized orders,[11] the defendant's differentiation in duty assignments seems realistically geared to its unique "job shop" character. Uniqueness is further indicated by the fact that the defendant solely has the facility and does produce "amber no-solvit hard flint" glass containers; solely can and does engage in straight-line decoration (a separate process whereby containers leave the "hot end," bypass the inspecting lehr and proceed by conveyor directly to the decoration department where they are inspected, selected, decorated and packed); and solely can and does accept small orders from customers. All of which is so because of the defendant's characteristic "job shop" peculiarity.

The most persuasive evidence of the need for flexibility, as well as of the divergence between the job functions of the male and female selector-packers, is demonstrated when a lehr is "down,"[12] i.e., not operating at a particular time upon the completion of a product run and prior to a new run, or because of realignment of conveyors, or for repairs, emergencies, etc. Unlike standard plants where lehrs are

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11. Exhibits D-52 to D-66 inclusive, demonstrate the variety of defendant's specialized products. Interestingly enough, in some parts of defendant's plant, the ancient and fascinating art of glass blowing is still practiced.

12. The testimony reveals that from January 1964 through September 1967, there were 5.29 job changes per day, or 6,890 changes. Lehrs are "down" during these changes. Lehrs are also "down" for other reasons, such as mechanical breakdowns, power outages (electrical failures, occurring 6 times during the summer of 1967), conducting of experiments and manufacturing of samples, etc. Further, it is not unusual for there to be 3 job changes in one shift, or 8, 9 or 10 changes in any one particular day.

seldom down, except for repairs or other maintenance problems, interruption of defendant's lehrs is frequent, essential and characteristic of its type of specialized production. When a lehr is "down," use must be made of its idled employees, otherwise they would be sent home and unpaid. To the mutual advantage of both management and labor, the defendant adopted a procedure whereby the work crew of the lehr, consisting of all females and those males unassigned to other duties, is transferred to an area known as "Resort." The function of the resort area is to provide further selecting and packing of that ware which has been rejected by the Quality Control and Inspection Department, to which the initially selected ware was submitted. The duties at the resort tables, performed by both males and females, are substantially the same as those performed at the lehrs. It is undisputed that females are occupied exclusively in the task of inspecting and packing of acceptable ware either at the lehrs or the resort area. (There was testimony that women spend 98.04 percent of their time selecting and packing while men are similarly engaged 81.74 percent [13] of their total time, the balance of which is devoted to other duties.) Nor is there any dispute that, in addition to selecting and packing at the lehrs or in resort, male selector-packers perform other duties. It is this area of "other duties," their necessity, nature, extent, and whether they are substantial enough to warrant the existing wage differential between the sexes, that lies at the core of our problem.

Attention has already been directed to some 16 or 17 different and specific duties performed by males and not

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13. These percentages were computed by a qualified Consulting Engineer who conducted an around-the-clock work sampling study covering 3 shifts from September 25, 1967 through October 7, 1967, wherein he made 118 trips and 5,455 observations.

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by females. Other factors to be considered, and distinctions to be made, are the six-month training or probationary period for men and that of three months for women; the greater flexibility in the use of the defendant's pool of employees made possible by the availability of men for work in excess of ten hours in any one work day and 54 hours in any one work week,[14] since the plant is in full production, 24 hours a day, 7 days a week; the excessive "absenteeism" of the females on a three to one ratio to the males, causing more than mere inconvenience in such a full time production plant, for it results in gaps in the labor lines which must be filled on short notice by the use of males at a higher base rate and at the usual overtime rate.

Defendant denies that distinction in sex lies at the heart of its wage disparity. It insists that the practical factors upon which its wage disparity is based are primarily the performance of the essential overall duties of the male selector-packers, involving as they do additional effort, skill, judgment and responsibility, made necessary by the peculiar character of its specialized type of operations. This being so, it argues, such real, practical and reasonable bases constitute factors other than sex as provided by the express exceptive language of the *Act*, and consequently there is no evasion in any sense of the salutary economic equality in sexes established by Congress.

The basic issue, of course, requires a determination of whether there is a difference in fact between male and

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14. Females are restricted by New Jersey law to these maximum hours for reasons of health, welfare and safety. R. S. 34:2-24, N. J. S. A., in pertinent part, provides: "No female shall be employed or permitted to work in any manufacturing or mercantile establishment, bakery, laundry or restaurant more than ten hours in any one day or more than six days, or fifty-four hours in any one week." L. 1912, c. 216 § 1, p. 337, as amended L. 1921, c. 194 § 1, p. 510 [1924 Suppl. § 107-137C(1)].

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female performance in the job of selector-packer and, if so, whether such difference is essential and substantial enough to constitute a realistic economic basis for disparity in wage rates. However, if such difference is merely incidental, insignificant and insubstantial to the performance of the principal task of the department in question, then it must be concluded that it is more artificial than real, leaving sex as the only realistic and distinctive basis for the wage disparity, contrary to the *Act*.

As heretofore stated, the declared purpose of the *Act* was to eliminate discrimination in wage payments to employees on the basis of sex where equal work was being performed by both men and women under the same or similar working conditions. However, if the differential is based upon any other factor other than sex, then that differential is beyond the reach of the *Act*. Legal precedents for guidance in the interpretation of this *Act* are few.[15] It is readily apparent that, in cases of this nature, the facts of work performance are the vital ingredients in determining the application of the *Act*. Factual resolution must be made on a case to case basis. In addition to conflicting views regarding the significance of job differences, the parties have advanced diametrically opposed contentions with respect to the intention of the *Act*. If there be some doubt of the statutory intent regarding the elements of the *Act*, its interpretation and application, as well as the

15. Wirtz v. Basic, Inc., 256 F. Supp. 786 (D. C. Nev. 1966); Kilpatrick v. Sweet, 262 F. Supp. 561 (D. C. Fla. 1967); Wirtz v. Rainbo, 17 WH 598, 54 LLC. ¶ 131 p. 884 (E. D. Ky. 1967), not yet official reported; Wirtz v. Dennison, 265 F. Supp. 787 (D. C. Mass. 1967); Wirtz v. Meade Mfg., Inc., 18 WH 89 (D. C. Kansas, 1967); cf. Bowe v. Colgate-Palmolive, 272 F. Supp. 332 (D. C. S. Ind. 1967), appeal pending in the Seventh Circuit. The War Labor Board decisions turned on "comparable" work and are inapposite subjudice. *See also*, Weeks v. Bell Tel. & Tel. Co., 56 LC ¶ 9084 p. 6823 (S. D. Ga. 1967), regarding protective legislation and occupational qualifications for females.

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burden of proof in cases of alleged violation, the Court may resort to the legislative history for the meaning attributed by the sponsors to the bill before its passage. Statements of sponsors of legislation provide an important and useful source of Congressional intent and purpose. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 394-395 (1951), *reh. den.* 341 U. S. 956 (1951), quoted with approval in *Woodwork Mfgrs. v. NLRB*, 386 U. S. 612, 640 (1967), *reh. den.* 387 U. S. 926 (1967). The legislative history of the *Act* clearly reveals that Congress intended to substitute the word "equal" for the former word "comparable," thereby meaning "substantially identical" rather than merely "similar" work.[16] Additionally, it employed two dissimilar concepts when it used both words "equal" and "similar" within the same sentence, obviously attributing different meanings to each, i.e. "equal" to work and "similar" to conditions. When the proposed Bill for equal pay was carried over from the 87th to the 88th Congress, the word "equal" was recommended by the Subcommittee. Not only was "equal" subsequently adopted by Congress as the vital spinal cord in the body of the *Act*, but the *Act*, itself, was named the "Equal Pay

16. Since 1945 equal pay bills have been introduced in every session of Congress by members of both political parties without much success. The use of female help in World War II economy, during a shortage of male help, generated much agitation to secure a man's wage for a man's work performed by a female. However, much of the proposed legislation pivoted on the word "comparable," and was found to be objectionable, as lacking sufficient objectivity regarding work performance. It was not until the 88th Congress, that enactment of the Equal Pay Act became possible by the significant change of "comparable" to "equal." Congresswoman Katherine St. George, who proposed the word "equal," stated that it connoted the Webster Dictionary definition of exactness in measure, quantity, number or degree, and like in value, quality, and status or portion, implying no difference in amount, number or value (108 Cong. Rec. 14767). Such meaning of the St. George amendment was approved by the House (108 Cong. Rec. 14771), passed by the 87th Congress, but did not receive action by the Senate before the Session ended.

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Act of 1963" and mandated the equation of equal pay for equal work—not almost, not like, not comparable and not similar, but "equal." In the difficult search for the precise meaning of statutory words, it is fortunate that the United States Congress provides the unique baffle of legislative history, lending a reliable measure of exposition in sound and depth to its statutory pronouncements. After much debate in both Houses, regarding clarification and the significance to be attributed to the concept "equal," Congress expressly set forth the elements of "skill," "effort" and "responsibility," as its components and guidelines in the interpretation and application of the *Act.*[17] So, also, was the key factor of *sex discrimination* explained. For as was said by Congressman Goodell, in speaking of intent of the *Act,* "[W]e want the private enterprise system, employer and employee and a union, if there is a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it . . . . [Sex] is the sole factor that we are inserting here as a restriction."[18] It was he who authored the first bills proposing that the equal pay provisions be placed within the *Fair Labor Standards Act* and that the terms "effort," "skill," "responsibility" and "similar working conditions," in exposition of the phrase "equal work," be incorporated therein.

Again, it was Congressman Goodell, joined by Congressmen Frelinghuysen and Griffin, who stated that in the event of alleged violations, it was the intention of the Bill to place two burdens of proof upon the Secretary of Labor: one, that of establishing a discrimination based on sex and, two, that of proving that such discrimination was not in fact based upon some other factor, other than

17. Ibid., n. 2.

18. 109 Cong. Rec. 9198 (1963).

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sex.[19] However, in the Upper House, the Chairman of the Senate Subcommittee, who guided the Bill through that body, declared that an employer who interposes a defense of exception to coverage assumes the burden of proving that it comes within the exceptive provisions of the *Act*.

The *Act* itself makes no express provision for the imposition of the burden of proof on either party. However, after its passage, the Wage and Hour Administrator, recognizing the divergence of views expressed in both Houses, adopted as an administrative interpretation the view of the Senate that the burden was upon the employer. 29 *CFR* § 800.141. The Administrator's interpretation of the legislation, charged as he is with its actual enforcement, is entitled to great weight. *Idaho Sheet Metal Works v. Wirtz,* 383 U. S. 190 (1966). The view imposing the burden upon the employer is the better one. Traditionally, one who alleges must prove. When the Secretary charges a violation, the burden of proof is his. Similarly, when an employer asserts an exception as an affirmative defense, the burden of proof is his. By way of analogy, the Supreme Court, in cases of claimed *exemption* from coverage by the *Act,* has placed the burden of proof upon the claimant or employer. *Idaho,* ibid, pp. 206, 208; *Arnold v. Ben Kanowsky, Inc.,* 361 U. S. 388 (1960); *Mitchell v. Kentucky Finance Co.,* 359 U. S. 290 (1959); *Walling v. General Industries Co.,* 330 U. S. 545 (1947). Its rationale seems far more compelling for acceptance in cases of undisputed coverage under the *Act,* but where, as here, *exception* is asserted.

It is precisely within the sphere of the statutory general exception of "any other factor other than sex," that the defendant has met its burden and demonstrated in a most convincing manner that substantial differences exist,

19. 109 Cong. Rec. 9196, 9203 and 9208.

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in fact, in the full job cycles between the sexes, thereby justifying the disparity in their wages.[20] Hardheaded industrial performance is demanded by the defendant in its "around-the-clock" business, which work performance must be practically and reasonably geared to its bisexual labor supply with its distinctive utility. The *Act* was never intended to circumscribe an employer's appraisal or determination of the need and utilitarian value of an employee's performance. What was intended was prohibition of specious distinction based upon sex alone, all other things being equal.[21]

It seems reasonably clear, both from the legislative history and the express statutory declaration of the *Equal Pay Act,* that discrimination in the payment of wages shall not be based upon sex under the *Fair Labor Standards Act,* of which it is now a part, any more than it might be based upon religion, color or national origin under the *Civil Rights Act.*[22]

A consideration somewhat in depth of the divergence in job content of defendant's male and female selector-packers tends to demonstrate that sex is a mere incidence to the real difference in their respective performances. True, in the assembly line phase of selecting and packing, both men and women perform identical functions. If nothing more remained to be done, and in fact was not done, then it would seem clear that within the confines of this

20. 29 CFR §§ 800.119-123.

21. "As the legislative history makes clear, the equal pay standard provided by the Act is designed to eliminate any wage rate differentials which are based on sex; nothing in the equal pay provisions is intended to prohibit differences in wage rates that are based not at all on sex but wholly on other factors." 29 CFR § 800.119 p. 618; See S. Rept. No. 176, 88th Cong. 1st sess., p. 4; H. Rept. No. 309, 88th Cong. 1st sess., p. 2.

22. Title VII, Civil Rights Act of 1964, 42 U. S. C. 2000e; Bowe v. Colgate-Palmolive etc., n. 15, ante.

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work function, they would be performing equal work for which equal pay should be mandated. But, the evidence demonstrates that such is not the case. For the job of the male neither begins nor ends with that particular performance, as it does with the female. It is the extended scope of the male's job requirements coupled with other distinguishing factors, heretofore set forth, and their cumulative effect upon which focus must be directed. So viewed, the proof amply demonstrates that men and women do not perform equal work under similar conditions within the intendment of the *Act*. To the contrary, men are required to exert additional effort, to possess additional skill and to have additional responsibility, which frequently are performed and discharged under the ever changing demands of working conditions, dissimilar to those prevailing for women.

In conclusion, the plaintiff-Secretary of Labor has failed to carry the burden imposed upon him by the *Act*, of proving that defendant's wage differential is based upon sex discrimination. In contrast, the defendant has discharged its burden of proving that it is within an exception to the general standard of wage equality imposed by the *Act*, for the acceptable proof convincingly demonstrates that the defendant's disparity in wages is based upon factors other than sex, and, consequently, as a matter of law, it is not in violation of the *Act*.

The foregoing opinion shall be in lieu of findings of fact and conclusions of law in compliance with *Rule* 52, *F.R.Civ.P.*, 28 U.S.C.

Counsel shall submit an appropriate order for judgment in favor of the defendant.

MITCHELL H. COHEN,
Mitchell H. Cohen,
Judge, United States District Court.

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Order for Judgment on Decision by the Court of the United States District Court for the District of New Jersey Dated May 14, 1968.

This action came on for trial before the court, Honorable Mitchell H. Cohen, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is on this 14 day of May, 1968 ORDERED AND ADJUDGED that Judgment on the merits be entered in favor of defendant and that the complaint herein be dismissed with prejudice.

MITCHELL H. COHEN,
U. S. D. J.

Dated at Camden, New Jersey, this 14th day of May, 1968.

Clerk of the Court

We consent to the form of the above Order:

CHARLES DONAHUE
Charles Donahue
Solicitor of Labor

JOHN A. HUGHES
John A. Hughes
Regional Attorney

FRANCIS V. LARUFFA
Francis V. LaRuffa
Supervising Attorney

MARY E. CERBONE
Mary E. Cerbone
Attorney

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Motion for Extension of Briefing Time Filed November 14, 1968.

Appellant, by his undersigned attorneys, moves the Court for an order extending the time for filing his brief from November 18, 1968 to December 9, 1968.

In support of this motion, appellant states that this case involves both the lengthy record of a sixteen-day trial, as well as a statute, the Equal Pay Act of 1963, whose provisions are now being considered on appeal for the first time. The novel statutory language and legislative history, as well as the array of evidentiary material, have required particularly careful and extensive consideration—a process which has been handicapped by the fact that the Department's appellate staff, shorthanded because of budget and hiring restrictions, is currently handling a particularly heavy case load. For these reasons it has become necessary to ask for an additional three weeks briefing time in order that we may adequately treat the issues in this case, which are of the greatest importance to the effective administration and enforcement of this new and difficult law.

Respectfully submitted,

CHARLES DONAHUE
Charles Donahue
Solicitor of Labor

ROBERT E. NAGLE
Robert E. Nagle
Attorney

CERTIFICATE OF SERVICE.

I certify that copies of this Motion were mailed this 13th day of November, 1968 to Mr. Joseph B. Kauffman, 1421 Atlantic Avenue, Atlantic City, N. J. and to Mr. Bruce W. Kauffman, Dilworth, Paxson, Kalish, Kohn & Levy, 2600 The Fidelity Building, Philadelphia, Pa. 19109.

ROBERT E. NAGLE
Robert E. Nagle

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Motion for Permission to File a Reply Brief of More Than 35 Typewritten Pages Filed February 27, 1969.

Pursuant to Rule 28(g), appellant, through his undersigned attorneys, respectfully moves this Court for permission to file a Reply Brief of 69 typewritten pages for the following reasons:

(1) This case is the first to reach an appellate court under the Equal Pay Act of 1963, and defendant's arguments raise questions involving the meaning of virtually all of the crucial terms of this new Act, as well as the Act's fundamental purposes and objectives. Adequate consideration of these questions is impossible without extensive discussion of the legislative history and background of the Act. The issues involved go far beyond this particular case, and basically affect the entire administration of the Act. We believe, also, that the Court's interests and convenience will be served by this more thorough presentation of the legislative background.

(2) Appellee has filed a 57-page printed brief, two addendums totaling 35 printed pages, and a 9-page appendix, all of which contain numerous inaccuracies and distortions of fact and law—including the charge that appellant's brief contains "glaring misstatements of the record" (D. br. p. 29ad). The importance of this case, we believe, warrants specific and detailed response to these misstatements, distortions and unfounded charges.

Respectfully submitted.

EDWARD D. FRIEDMAN
Edward D. Friedman
Acting Solicitor of Labor

BESSIE MARGOLIN
Bessie Margolin
Associate Solicitor

ROBERT E. NAGLE
Robert E. Nagle, Counsel
for Appellate Litigation

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CERTIFICATE OF SERVICE.

I certify that copies of this Motion for Permission to File a Reply Brief of More than 35 Typewritten Pages, together with copies of the attached Reply Brief, were mailed this 26th day of February 1969 to Mr. Joseph B. Kauffman, 1421 Atlantic Avenue, Atlantic City, New Jersey, and to Mr. Bruce W. Kauffman, Dilworth, Paxson, Kalish, Kohn & Levy, 2600 The Fidelity Building, Philadelphia, Pennsylvania 19109.

BESSIE MARGOLIN
Bessie Margolin

Order of the United States Court of Appeals for the Third Circuit Dated October 23, 1969.

It is ORDERED that the above-entitled case be reheard before the original panel on Tuesday, December 2, 1969.

The Court calls the attention of counsel to the following specific questions to which they should address themselves at the oral argument in addition to all other questions involved:

1. Can a 10% differential (or any differential) in favor of male selector-packers over female selector-packers be justified under the Equal Pay Act on the basis of the advantage of flexibility to the employer in male selector-packers' availability for assignment to various unskilled tasks, when it appears that female selector-packers perform skilled selector-packer work 98% of their time while male selector-packers do skilled work only 81% of the time, and that "snap-up boys" receive 2 cents per hour more than female selector-packers although nearly all of their work they do is clearly unskilled?

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2. To what extent does the Civil Rights Act of 1964 affect the construction of the Equal Pay Act of 1963?

3. Is there any evidence in the record which would indicate discrimination in arriving at the two classifications of male and female selector-packers?

The parties may, if they wish, file supplemental briefs, appellant's to be filed on or before November 6, 1969, appellee's on or before November 21, 1969, and appellant's reply, if any, on or before November 28, 1969.

BY THE COURT,
FREEDMAN, *Circuit Judge*

Dated: October 23, 1969.

Opinion of the United States Court of Appeals for the Third Circuit Filed on January 13, 1970.

FREEDMAN, *Circuit Judge.*

This appeal presents important problems in the construction of the Equal Pay Act of 1963 (29 U. S. C. § 206(d)), which was added as an amendment to the Fair Labor Standards Act of 1938 (29 U. S. C. §§ 201, et seq.).

The Equal Pay Act prohibits an employer from discriminating "between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except

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where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex. . . ."[1]

Invoking the enforcement provisions of the Fair Labor Standards Act[2] the Secretary of Labor brought this action against Wheaton Glass Co., claiming that it discriminated against its "female selector-packers" on the basis of sex by paying them at an hourly rate of $2.14, which is 10% less than the $2.355 rate it pays to its "male selector-packers." The Secretary sought an injunction against future violations and the recovery of back pay for past violations.[3] The company denied that the female selector-packers perform equal work within the terms of the Act and claimed that in any event the 10% pay differential is within exception (iv) of the Act because it is based on a "factor other than sex."

After an extensive trial the district court entered judgment for the defendant, holding that the Secretary had failed to carry his burden of proving that the wage differential was based upon sex discrimination and that the company had discharged the burden of establishing the

1. 29 U. S. C. § 206(d)(1). The full provision reads:

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

2. 29 U. S. C. § 217.

3. See 29 U. S. C. § 206(d)(3).

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exception that the wage differential was based on a factor other than sex. Wirtz v. Wheaton Glass Co., 284 F. Supp. 23 (D. N. J. 1968). The Secretary has appealed.

The Company is one of the largest manufacturers of glass containers in the United States. Its plant at Millville, New Jersey, which is here involved, is called a "job shop" plant and manufactures glass containers to special order. Unlike the usual modern plants in the glass industry which make standard items in large quantities and employ automatic machinery, the company's job shop operation requires manual handling and visual inspection of the product.

Selector-packers are employed in the Bottle Inspection Department. They work at long tables and visually inspect the bottles for defects as they emerge on a conveyor from the oven, or "lehr." The defective products are discarded into waste containers. Those which meet the specifications are packed in cardboard cartons on a stand within arm's reach of the selector-packers and then lifted onto an adjacent conveyor or rollers and sent off to the Quality Control Department for further examination and processing. In the Bottle Inspection Department is another category of employees known as "snap-up boys," who crate and move bottles and generally function as handymen, sweeping and cleaning and performing other unskilled miscellaneous tasks. They are paid at the hourly rate of $2.16.

Prior to 1956, the company employed only male selector-packers. In that year, however, the shortage of available men in the Millville area forced the company to employ for the first time female selector-packers. On the insistence of the Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, Local 219, an all male local with which the company had a collective bargaining agreement, there was, in the language of the district court,

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"carved out of the total job of selector-packer . . . a new role of female selector-packer." This new classification was written into the collective bargaining agreement, and pursuant to it female selector-packers were not to lift bulky cartons or cartons weighing more than 35 pounds. At the union's insistence a provision was added to the collective bargaining agreement that no male selector-packer was to be replaced by a female selector-packer except to fill a vacancy resulting from retirement, resignation, or dismissal for just cause.

On its face the record presents the incongruity that because male selector-packers spend a relatively small portion of their time doing the work of snap-up boys whose hourly rate of pay is $2.16, they are paid $2.355 per hour for their own work, while female selector-packers receive only $2.14. This immediately casts doubt on any contention that the difference in the work done by male and female selector-packers, which amounts substantially to what the snap-up boys do, is of itself enough to explain the difference in the rate of pay for male and female selector-packers on grounds other than sex.

The district court explored this difference in some detail. The court found that while male and female selector-packers perform substantially identical work at the ovens, the work of the male selector-packers is substantially different because they perform sixteen additional tasks. These consist of lifting packages weighing more than 35 pounds;[4] lifting cartons which, regardless of weight, are bulky or

4. For a discussion of the effect of weight-lifting restrictions under the Equal Pay Act, see H. R. Rep. No. 309, to accompany H. R. 6060, at p. 3, 88th Cong. 1st Sess. (1963). See also comments of Rep. Thompson of New Jersey, 109 Cong. Rec. 9198 (1963). Weight-lifting restrictions on females similar to those imposed by Wheaton Glass have been held illegal under the Civil Rights Act of 1964, 42 U. S. C. § 2000(e), et seq. Bowe v. Colgate-Palmolive Co., 416 F. 2d 711 (7 Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (5 Cir. 1969).

difficult to handle; stacking full cartons; tying stacks of cartons; moving wooden pallets fully loaded with stacks of cartons; moving and placing empty pallets for later use; operating hand trucks near the ovens; positioning and adjusting portable roller conveyors and packing stands holding empty cartons for filling; collecting dump trays and tubs of rejected glassware; sweeping and cleaning work areas near the ovens; fitting and attaching metal clips to glass containers at the ovens; unjamming overhead carton conveyors and automatic belts; occasionally reinspecting, repacking and restacking glassware already delivered to the premises of customers; locating glassware in the warehouse, at times involving climbing over palletized cartons; and voluntarily working, when necessary, in excess of ten hours per day or of 54 hours per week.[5] The district court also found that the training period for men was six months, whereas the training period for women was three months.[6]

The district court pointed to evidence submitted by the company that the male selector-packers spent an average of approximately 18 percent of their total time on this work, which was forbidden to women. It made no finding, however, that this was a fact, nor did it make any finding as to what percentage of time was spent by male selector-packers either on the average or individually in performing this different work. Indeed, it made no finding that all male selector-packers performed this extra work, but

5. It is argued that under New Jersey law, women are barred from working double shifts. But see Wirtz v. Rainbo Baking Co. of Lexington, 303 F. Supp. 1049 (E. D. Ky. 1967), holding that such a statutory restriction on the number of hours a female employee can work will not justify payment of lower wages. To the same effect as *Rainbo,* see the applicable regulation, 29 C. F. R. § 800.163.

6. A similar difference in training was recently held not to constitute a defense to a claim of discrimination under the Equal Pay Act. Shultz v. First Victoria National Bank, — F. 2d — (5 Cir. 1969).

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only that the extra work when not performed by snap-up boys was done by male selector-packers. There is, therefore, no basis for an assumption that all male selector-packers performed any or all of these 16 additional tasks.

Even if there had been a finding that all the male selector-packers performed all of the 16 additional tasks and that these consumed a substantial amount of their time, there would still be lacking an adequate basis for the differential in wages paid to male and female selector-packers. For there would be no rational explanation why men who at times perform work paying two cents per hour more than their female counterparts should for that reason receive 21½ cents per hour more than females for the work they do in common.

The district court, therefore, placed its conclusion on a factor of "flexibility." The company's job shop requires frequent shutdowns of the ovens when a customer's order is completed and before the run of a new order is begun. During such shutdowns the idled female selector-packers are assigned to what is known as the "Resort" area, where they inspect and pack glassware rejected by the Quality Control Inspection Department. Idled male selector-packers are similarly reassigned to the Resort area, but some of them are assigned to do work which otherwise would be done by snap-up boys.

The district court found that this availability of male selector-packers to perform the work of snap-up boys during shutdowns was an element of flexibility and deemed it to be of economic value to the company in the operation of its unique, customized plant. It is on this element of flexibility that the judgment of the district court ultimately rests.

Under the collective bargaining agreement the company could at any time assign selector-packers to perform the work of snap-up boys, although they would continue

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to receive their regular rate of pay. While this explains why male selector-packers would not have their pay reduced in performing work of snap-up boys, it does not run the other way and explain why their performance of the work of snap-up boys who receive only two cents per hour more than female selector-packers justifies their being paid 21½ cents per hour more than female selector-packers for performing selector-packer work.

Whatever difference may exist in the total work of male and female selector-packers because men also perform work of snap-up boys does not justify a class wage differential in the absence of any finding regarding the number of male selector-packers who perform or are available for the work of snap-up boys. While all male selector-packers receive the higher rate of pay, there is no finding that all of them are either available for or actually perform snap-up boys' work.

An even more serious imperfection in the claim of flexibility is the absence, as we have already indicated, of any finding or explanation why availability of men to perform work which pays two cents per hour more than women receive should result in overall payment to men of 21½ cents more than women for their common work. A 10% wage differential is not automatically justified by showing that some advantage exists to the employer because of a flexibility whose extent and economic value is neither measured nor determined and which is attained by the performance of work carrying a much lower rate of pay. In short, there is no finding of the economic value of the element of flexibility on which the district court justified the 10% discrimination in pay rate between male and female selector-packers.

There is, moreover, an additional element of significance with which the district court did not deal. Just as it

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has not been made clear by any finding that all male selector-packers perform or are available for the work of snap-up boys, so there is an absence of any finding on the ability of any female selector-packers to perform the work of snap-up boys. The fact that some female selector-packers, unlike some male selector-packers, may have been unwilling or unable to do the work of snap-up boys might justify a wage differential between them. But it would still leave open the question why the company did not include under its flexibility requirement the female selector-packers who are both able and willing to do the work of snap-up boys. There may have been some male selector-packers who were unwilling or even incompetent to do the work of snap-up boys. Yet because some of the class was willing and available to do the work of snap-up boys, all of the class received 21½ cents per hour more than all females, including those who might have been willing and able to do the work of snap-up boys when it was required.

These disparities in rates of pay under which snap-up boys performing physical labor receive a higher rate than female selector-packers while male selector-packers receive a much higher rate because they are available also to do some of the work of snap-up boys, take on an even more discriminatory aspect when viewed in the light of their history. For as the district court indicated, the classification of female selector-packers at the lowest rate of pay of these three categories was made at a time of labor shortage when the company was forced to hire women and the union insisted on conditions which would minimize their future competition against the men with whom they would now be working. The motive, therefore, clearly appears to have been to keep women in a subordinate role rather than to confer flexibility on the company and to emphasize this subordination by both the 10% differential between male and

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female selector-packers and the two cents difference between snap-up boys and female selector-packers.

The effect of such a motive and the evaluation of the distinction in the work done by male and female selector-packers requires us to turn to the construction of the Equal Pay Act of 1963. The Act was the culmination of many years of striving to eliminate discrimination in pay because of sex. Similar bills were before Congress for many years before the Act ultimately was adopted, and in its final form it bears evidence of the competing tendencies which surrounded its birth. There are problems of construction which leap up from the reading of its language. It has not been authoritatively construed by the Supreme Court and a study of its legislative history and the bills which preceded it [7] yields little guidance in the construction of its provisions in concrete circumstances.

In adopting the Act, Congress chose to specify equal pay for "equal" work. In doing so, Congress was well aware of the experience of the National War Labor Board [8] during World War II and its regulations requiring equal pay for "comparable" work. Under these regulations the National War Labor Board made job evaluations to determine whether inequities existed within a plant even between dissimilar occupations. Since Congress was aware of the

7. See, e.g., Sen. Rep. No. 176, to accompany S. 1409, 88th Cong. 1st Sess. (1963); H. R. Rep. No. 309, to accompany H. R. 6060, 88th Cong. 1st Sess. (1963); 109 Cong. Rec. 2886-90, 8914-16, 9195-9213, 9761-62 (1963); 108 Cong. Rec. 14767-69 (1962); Hearings Before the Senate Subcomm. on Labor of the Comm. on Labor & Public Welfare on S. 2494 and H. R. 11677, 87th Cong. 2d Sess. (1962); Hearings Before the House Special Subcomm. on Labor of the Comm. on Educ. & Labor on H. R. 3861 and related bills, 88th Cong., 1st Sess. (1963); Hearings Before the House Select Subcomm. on Labor of the Comm. on Educ. & Labor on H. R. 8898 and H. R. 10226, 87th Cong. 2d Sess. (1962).

8. The National War Labor Board was created by Executive Order No. 9017, 3 C. F. R. § 1075 (1942).

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Board's policy and chose to require equal pay for "equal" rather than "comparable" work, it is clear that the references in the legislative history to the Board's regulations were only to show the feasibility of administering a federal equal pay policy[9] and do not warrant use of the Board's decisions as guiding principles for the construction of the Equal Pay Act.

On the other hand, Congress in prescribing "equal" work did not require that the jobs be identical, but only that they must be substantially equal.[10] Any other interpretation would destroy the remedial purposes of the Act.

The Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.[11]

Differences in job classifications were in general expected to be beyond the coverage of the Equal Pay Act. This was because in the case of genuine job classifications the differences in work necessarily would be substantial and the differences in compensation therefore would be based on the differences in work which justified them. Congress

9. See, e.g., Sen. Rep. No. 176, to accompany S. 1409, 88th Cong. 1st Sess. 3 (1963).

10. See Wirtz v. Rainbo Baking Co., supra, n. 5, in which the court stated that equal work does not mean identical work and that different tasks which are only incidental and occasional would not justify a wage differential. Accord: Shultz v. Brookhaven General Hospital, 61 L. C. ¶ 32,242 (N. D. Tex. 1969); Wirtz v. Basic, Inc., 256 F. Supp. 786 (D. Nev. 1966); 29 C. F. R. § 800.100, et seq.

11. The broader anti-discriminatory purposes of the Act, as expressed in the Senate and House subcommittee hearings, the floor debates in Congress, and the message of President Kennedy on signing the Act, are set out in extensive quotation in Shultz v. First Victoria National Bank ,— F. 2d — nn. 17-21 (5 Cir. 1969). With respect to the depressing effects of sex discrimination on the economy, see also § 2 of the Act, Public Law 88-38 (1963).

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never intended, however, that an artifically created job classification which did not substantially differ from the genuine one could provide an escape for an employer from the operation of the Equal Pay Act.[12] This would be too wide a door through which the content of the Act would disappear.

This view is strengthened by the subsequent adoption of Title VII of the Civil Rights Act of 1964[13] which prohibits discrimination because of sex in the classification of employees as well as in their employment and compensation.[14] Although the Civil Rights Act is much broader than the Equal Pay Act, its provisions regarding discrimination based on sex are in pari materia with the Equal Pay Act. This is recognized in the provision of § 703(h) of the Civil Rights Act (42 U. S. C. § 2000e-2(h)) that an employer's differentiation upon the basis of sex in determining wages or compensation shall not be an unlawful employment practice under the Civil Rights Act if the differentiation is authorized by the Equal Pay Act. Since both statutes serve

12. The committee report accompanying the final version of the Act stated the effect of its language as it bore on job classification as follows: "This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in the majority of the job classification systems. Thus it is anticipated that a *bona fide* job classification program *that does not discriminate on the basis of sex* will serve as a valid defense to a charge of discrimination." [Emphasis supplied.] H. R. Rep. No. 309, May 20, 1963.

13. 42 U. S. C. § 2000e.

14. Section 703 of that Act (42 U. S. C. § 2000e-2) makes it an unlawful employment practice for an employer to fail or refuse to hire or to discharge anyone and also "otherwise to discriminate against any individual with respect to his *compensation*, terms, conditions, or privileges of employment because of such individual's race, color, religion, *sex* or national origin"; or to "classify employees in any manner which would deprive or tend to deprive any individual of "employment opportunities or otherwise adversely affect his status as an employee" for any of the above causes, including sex. [Emphasis supplied.]

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the same fundamental purpose against discrimination based on sex, the Equal Pay Act may not be construed in a manner which by virtue of § 703(h) would undermine the Civil Rights Act.[15]

It is not necessary here, however, to delineate the precise manner in which these two statutes must be harmonized to work together in service of the underlying Congressional objective. For even if the Civil Rights Act is put aside, the Equal Pay Act alone does not permit artificial classification to prevent inquiry whether there exists a difference in pay for substantially equal work.

The district court held that the Secretary failed to carry his burden of proof that the company's wage differential is based on sex discrimination. In view of the facts which the district court found, we hold this conclusion to be erroneous. The Secretary met his burden of proof when he showed that male selector-packers received a pay rate 10% higher than female selector-packers although both performed identical work and that the additional work of snap-up boys which male selector-packers also performed was work which carried virtually the same rate of pay as that done by women. When to these circumstances are added the origin of the classification of female selector-packers and their reduced pay even below that paid to snap-up boys, the Secretary clearly established his prima facie case that the wage differential was based on sex and therefore discriminated against women.

Under the statute, the burden of proof thereupon fell on the company to prove its claim that it came within exception (iv).[16] This burden the district could held the company had successfully met.

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15. See Kanowitz, "Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963," 20 Hastings L. J. 305 (1968).

16. Shultz v. First Victoria National Bank, — F. 2d —, n. 6 (5 Cir. 1969); Wirtz v. Basic, Inc., 256 F. Supp. 786, 790 (D. Nev. 1966).

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There is no finding, nor indeed evidence in the record on which a finding could be based, of the economic value of the labor of snap-up boys performed by male selector-packers. Nor is there any finding or evidence from which adequate findings could be made to support the claim that flexibility justifies the 10% wage differential. There are no detailed studies, records or testimony showing the extent of the closing down of the ovens or of the amount of savings which the company effected by being able to use male selector-packers to help out in the work of snap-up boys. More significantly, there is nothing in the record to show the amount of any such savings or that the element of flexibility bore any relation to the 10% wage differential between male and female selector-packers. Nor are there any findings that all members of the class of male selector-packers were able and available to do the work of snap-up boys whereas no members of the class of female selector-packers were so available.

The burden of showing this properly rested on the company, for it invoked the defense that the differential was based on a factor other than sex. In cases such as this, where the justification for the differential rests on economic benefit, the company has peculiarly within its knowledge the means of proof, and the burden therefore is one which cannot be satisfied by general or conclusory assertions.

The district court held that the company met its burden of proving that it came within the exception because "the acceptable proof demonstrates that the defendant's disparity in wages is based upon factors other than sex. . . ." It also stated that "substantial differences exist, in fact, in the full job cycles between the sexes, thereby justifying the disparity in their wages." These, however, are statements of ultimate conclusions for which there is no adequate support either in findings of fact or in the record.

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We are, of course, bound by findings of fact unless they are clearly erroneous. Federal Rule of Civil Procedure 52(a). See Speyer, Inc. v. Humble Oil and Refining Co., 403 F. 2d 766, 770 (3 Cir. 1968). We are not, however, bound by evidence which has not reached the status of a finding of fact, nor by conclusions which are but legal inferences from facts. Baumgartner v. United States, 322 U. S. 665, 670-71 (1944); Lehmann v. Acheson, 206 F. 2d 592, 594 (3 Cir. 1953); and cases cited 2B Barron & Holtzoff, Federal Practice and Procedure § 1137, n. 12 (Wright ed. 1961).[17]

Since the Secretary established his prima facie case and the company failed to prove that the discrimination in wages paid to female selector-packers was based on any factor other than sex, the claim of the Secretary was established and an appropriate judgment should have been entered in his favor.

The judgment of the district court, therefore, will be reversed with direction to enter an appropriate judgment in favor of plaintiff.

Judgment on Reargument of the United States Court of Appeals for the Third Circuit Dated January 13, 1970.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was reargued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 14, 1968, be, and the same is

17. See also United States v. Singer Mfg. Co., 374 U. S. 174, 194, n. 9 (1963), conclusions of fact induced by erroneous legal standards are not within coverage of Rule 52(a). And see Note, "Social and Economic Facts," 61 Harv. L. Rev. 692, 699-700 (1948).

hereby reversed, and the cause remanded with direction to enter an appropriate judgment in favor of plaintiff, in accordance with the opinion of this Court.

ATTEST,
THOMAS F. QUINN,
Clerk.

January 13, 1970.

Order of the United States Court of Appeals for the Third Circuit Dated February 13, 1970.

The opinion filed in this case on January 13, 1970, is hereby amended as follows:

1. The words "an all male local" on lines 9 and 8 from the bottom of page 3 of the slip opinion are stricken out.

2. The first two sentences on page 12 of the slip opinion are amended to read as follows:

> "More significantly, there is nothing in the record to show the amount of any savings which the company effected by being able to use male selector-packers to help out in the work of snap-up boys or that the element of flexibility bore any relation to the 10% wage differential between male and female selector-packers."

FREEDMAN,
Circuit Judge.

Dated: February 13, 1970.

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Order Sur Petition for Rehearing of the United States Court of Appeals for the Third Circuit Dated February 13, 1970.

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

FREEDMAN,
Judge.

Dated: February 13, 1970.

APPENDIX C.

U. S. Department of Labor
Wage and Hour and Public Contracts Divisions
Washington, D. C. 20210

24 AB 706
Jun 3, 1964

This is with further reference to your letter of May 8, 1964, in which you presented three specific questions regarding the application of the Equal Pay Act to employment in the food distribution industry.

Your questions, and the answers to them as explained at our meeting on May 7, are as follows:

> Question 1: Assume that in a supermarket which is a covered establishment within the meaning of the Equal Pay Act, a covered male employee and a covered female employee are each employed under the general job title "clerk". Assume further, that the female employee performs check stand operations during the full work cycle, whereas the male employee performs such work during 80 percent of the work cycle and during the remaining 20 percent unloads and/or handles merchandise from trucks and performs heavy stocking and heavy clean-up work, which involve the lifting and moving of heavy objects and include substantial elements of "push, pull, lift and carry". If there were a pay differential based entirely on the work performed by the male during the described 20 percent of the work cycle, would a question be raised under the Equal Pay Act?

Answer: Based solely on the situation as described in your question, the male and female clerk would appear to have

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jobs sufficiently different in content so that they would not, within the meaning of the act, be performing "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Under such circumstances the act would not prohibit the payment of different wage rates to the male and female clerk. This answer assumes, of course, that the requirements and conditions of performance of the two jobs are completely and accurately described in your question and that there are no other factors which, under the principles explained in 29 CFR Part 800, are pertinent to a determination of equality of the work under the statutory tests.

Question 2: Assume that in a supermarket, which is a covered establishment within the meaning of the Equal Pay Act a covered male employee and a covered female employee are each employed under the general job title, "clerk". Assume further that the female employee performs check stand operations during 80 percent of the work cycle and during the remaining 20 percent performs light cleaning and light stocking work involving no greater effort, responsibility, skill and dexterity than her work at the check stand. Assume further that the male employee performs the same check stand operations during 80 percent of the work cycle and during the remaining 20 percent unloads and/or handles merchandise from trucks and performs heavy stocking and heavy clean-up work, which involve lifting and moving of heavy objects and include substantial elements of "push, pull, lift and carry". If there were a pay difference based entirely on the work performed by each during the described 20 percent of the work cycle, would a question be raised under the Equal Pay Act?

Answer: Your statement of this situation would appear to call for the same answer as in the first situation, based on the same assumptions. However, as indicated in 29 CFR 800.112, mere differences in the kind of effort required in performance of the non-checking duties of the two jobs may not make the jobs unequal where there is no substantial difference in the amount or degree of effort required for their performance. In such a situation it would be material whether or not the kind of effort required in the one job is so different from the kind of effort required in the other that the difference would be commonly recognized in wage administration as a significant factor in determining wage rates irrespective of the sex of the employees who perform such duties. In a situation of the kind described in your second question the permissibility under the statute of a wage differential between the male and female clerk jobs would depend in the final analysis on whether the performance requirements during 20 percent of the work cycle are *actually* so substantially different as to render the jobs *as a whole* unequal in significant respects under the statutory tests. Although your statement indicates that this may be so in the case you have in mind, a careful scrutiny and evaluation of the facts in each case would be necessary before a firm answer could be given.

Question 3: Once having decided that there is a difference in skill, effort or responsibility in work performance that makes two jobs essentially different, will the Department of Labor question the extent of a wage differential?

Answer: No. The extent of differentials between the wages paid to male and female employees will not be questioned by the Department in any case where it has concluded that the facts establish that employees of opposite sexes are not

engaged, within the meaning of the statute, in "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

Sincerely yours,

/s/ Clarence T. Lundquist
Administrator

APPENDIX D.

Complaint.

Plaintiff brings this action to enjoin defendant from violating the provisions of sections 15(a)(1) and 15(a)(2) of the Fair Labor Standards Act of 1938, as Amended (52 Stat. 1060; 29 U. S. C. 201 et seq., hereinafter called the Act) and to restrain any withholding of payment of wages found by the court to be due to employees under the Act.

I.

Jurisdiction of this action is conferred upon this court by section 17 of the Act.

II.

Defendant, WHEATON GLASS Co., is and at all times hereinafter mentioned was a New Jersey corporation having an office and place of business at 220 "G" Street, Millville, Cumberland County, New Jersey, within the jurisdiction of this court, and is and at all times hereinafter mentioned was engaged in the manufacture and distribution of glassware.

III.

At all times hereinafter mentioned defendant employed, and it is employing, approximately 1200 employees in and about its aforesaid place of business in the manufacture and distribution of glass containers and laboratory glassware. Substantial quantities of the goods produced by these employees have been and are being produced for commerce within the meaning of the Act, and have been and are being transported, offered for transportation, shipped, delivered, and sold in commerce from defendant's aforesaid place of business to other states.

IV.

Defendant, an employer having employees subject to the provisions of section 6 of the Act, as aforesaid, has repeatedly violated, and it is violating, the provisions of sections 6(d) and 15(a)(2) of the Act by discriminating, within its aforesaid establishment in which such employees have been and are employed, between employees on the basis of sex by paying wages to employees in such establishment at rates less than the rates at which it pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

V.

Defendant has repeatedly violated, and it is violating, the provisions of section 15(a)(1) of the Act in that it has transported, offered for transportation, shipped, delivered, and sold in interstate commerce, from its aforesaid place of business to other states, goods in the production of which many of its employees were employed in violation of section 6 of the Act, as alleged.

VI.

Since on or about March 1, 1965, defendant has repeatedly violated, and it is violating, the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is expressly authorized by section 17 of the Act;

WHEREFORE, cause having been shown, plaintiff prays judgment permanently enjoining defendant, its officers, agents, servants, employees and those persons in active

concert or participation with them from violating the provisions of sections 15(a)(1) and 15(a)(2) of the Act, and for such other and further relief as may be necessary and appropriate, including the restraint of any withholding of payment of wages found by the court to be due to employees under the Act.

CHARLES DONAHUE,
Charles Donahue,
Solicitor of Labor,

JOHN A. HUGHES,
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CERTIFICATE OF SERVICE.

I hereby certify that on this 3rd day of April, 1970, five copies of the Petition for Writ of Certiorari were hand delivered to each of the following attorneys:

Bessie Margolin, Esq.
United States Department of Labor
Washington, D. C. 20210

Solicitor General
Department of Justice
Washington, D. C. 20530

Albert K. Plone, Esq.
400 Market St.
Camden, N. J. 08102

I further certify that all parties required to be served have been served.

/s/ Bruce W. Kauffman,
Bruce W. Kauffman,
2600 The Fidelity Bldg.,
Philadelphia, Pa. 19109
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1388

WHEATON GLASS COMPANY, PETITIONER

v.

GEORGE P. SHULTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

The Secretary of Labor brought this suit under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217)[1] to enjoin violations of the Equal Pay Act of 1963 (29 U.S.C. 206(d), set forth at Pet. 3–4). Petitioner contended that its male and female employees were not performing "equal work" within

[1] Section 17 of the Fair Labor Standards Act, in pertinent part, provides:

"The district courts * * * shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act * * *."

the meaning of the Act because of claimed differences in their respective job requirements, and that the differential between their wage rates was justified as based on a "factor other than sex" within the meaning of the exception provided in Section 6(d)(1)(iv).

1. The evidence showed that Wheaton Glass Company at its glass container manufacturing plant in Millville, New Jersey, employs about 275 men and about 230 women as selector-packers in the plant's bottle inspection department (App. 976).[2] The men selector-packers are paid 21½ cents per hour more than the women. At the time of trial, the selector-packer (male) hourly wage rate was $2.355 and the female rate was $2.14 (Pet. App. A67). Prior to 1956, the petitioner had employed only men as selector-packers (Pet. App. A45). The wage differential originated in a 1956 agreement between petitioner and a labor union which provided that female selector-packers might be employed, but that no male selector-packer then employed was to be replaced by a female selector-packer except to fill a vacancy resulting from retirement, resignation, or dismissal for just cause (App. 1368). Thereafter, the union contracts consistently provided a separate wage classification for "Female Selector-Packer" with a wage rate about 10 percent less than that for the "Male Selector-Packer" classification (Pl. Exh. 14; App. 1376–1381).

The principal function of both the men and women selector-packers, and the bulk of their working time

[2] "App." references are to the Appendix Record in the District Court.

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(estimated by a witness for petitioner to be an *average* of 98 percent for women as a class and of 81 percent for men as a class) consists of performance of identical selecting and packing operations (Pet. App. A52, A58). This is semi-skilled work, requiring specialized knowledge and training to detect defects in the glassware quickly (App. 965–966, 1226).[3] Generally, 3 to 7 selector-packers are assigned to a particular lehr[4] without regard to sex, and men and women work side-by-side selecting and packing identical ware into identical boxes.

The only differences in the work of male and female selector-packers consist, in substance, of assignments made to some (but not to all) of the men during relatively small portions of their time—*i.e.*, when they are not needed for the selecting-packing operation—of miscellaneous unskilled common labor tasks ordinarily performed by so-called "snap-up boys" (Pet. App. A67, A69).[5] The snap-up boys' wage

[3] It is also tedious and fatiguing work, which requires standing for long hours in one position with continuous, production-paced, physical and visual exertion and attention (App. 768–769, 827–828, 869).

[4] A "lehr" is a cooling oven which tempers the glassware as it moves by conveyer belt to the selector-packers (Pet. App. A42, n. 5). There are 24 lehrs in the plant, about 20 of which are in operation at any one time (App. 398–399, 1077).

[5] Contrary to petitioner's contention that "all" male selector-packers performed all of the "additional" tasks (Pet. 9), the district court did not, as the court of appeals noted, make "any findings that all members of the class of male selector-packers were able and available to do the work of snap-up boys, whereas no members of the class of female selector-packers were so available" (Pet. App. A76, A68–69). Petitioner's argument that the word "all" was "understood" and, in

rate (the lowest male wage in the plant) is virtually the same as that paid to female selector-packers—presently two cents (originally only ½ cent) per hour more than the "Selector-Packer (Female)" rate (Pl. Exh. 14). Under the union collective bargaining agreement, men selector-packers when assigned temporarily to such "snap-up" work are entitled to continue to receive their much higher regular wage rate (App. 770–771; Pl. Exh. 14). The amount of "snap-up" work assigned to individual men has varied from 20 percent of their working time to little or none. Regardless of the amount, if any, of such work assigned to individual men, *all* of the several hundred male selector-packers are paid the same higher male wage rate.[6]

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any event, was supported by "uncontradicted" evidence is in error. On the contrary, uncontradicted evidence showed that about 25 men employed on the "permanent resort crews" do nothing but selecting-packing on a "steady basis" (App. 226-227, 261, 1013, 1087, 1299), and individual male selector-packer witnesses testified that they rarely performed any of the "additional" tasks and never performed some of them (App. 118, 139, 193-194, 203, 386-387). There was also uncontradicted testimony by the 25 women witnesses that each of them had also performed some of these miscellaneous "snap-up" tasks (*e.g.*, App. 29–30, 241–242, 285–286, 306, 323–327, 345–350, 381, 558, 571–574, 622).

[6] Petitioner's evidence did not purport to show anything more than an "average" of male selector-packer performance of such tasks, and this average included the group known as "Relief Selector-Packers" who admittedly were more available for assignment to snap-up work (App. 215–217, 236, 361, 388) than were the regular selector-packers who comprised the great majority of both men and women selector-packers.

Petitioner adduced testimony itemizing every task, other than selecting-packing, *ever* performed by *any* male selector-

The main thrust of petitioner's evidence in defense of the wage differential was, as indicated by the trial court's opinion (Pet. App. A38–A59), that "the need for flexibility" in the operation of petitioner's plant requires the "maximum utilization of its male labor force" (Pet. App. A51), and that "because of their limited utility * * * females did not provide the requisite flexibility" (Pet. App. A47) and it was therefore necessary for defendant to use "the versatile male selector-packer" for some of the miscellaneous "snap-up" labor (Pet. App. A46). Admittedly the women were not idle while men were performing such "other" tasks. The women (as well as most of the men) continued performance of the skilled and demanding selecting-packing function, either at a lehr or in the "resort" area of the department (App. 23, 43, 57, 118, 171, 261–262, 291, 370–371, 386, 416, 469, 561).[7]

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packer (which grew to the 16 items listed in the district court's opinion, Pet. App. A43–44), all of which tasks were asserted to be job requirements for the male selector-packer wage classification. No such distinctions in the job content of male and female selector-packers have ever been specified in any job descriptions or in the wage rate classification schedules. Petitioner admittedly had never adopted job descriptions of any kind (other than the bare wage-classification titles), nor had petitioner ever made or used any job evaluation study or plan in establishing its wage rates (Pet. App. A46; App. 1022, 1041, 1227, 1244).

[7] The uncontradicted testimony of male selector-packer witnesses was that the assignment to "snap-up" work was a welcome relief from the tedium and strain of selecting-packing and that such work was "easier" and less tedious than selecting-packing (App. 273, 446, 769, 827, 869).

2. The decisions of the courts below were predicated on their respective different interpretations of the meaning of the statutory term "equal," and of the statutory exception for differentials based on a "factor other than sex."

The district court construed the term "equal" to mean "substantially identical" work (Pet. App. A55). Applying this narrow interpretation, it held that the Secretary had failed to meet the burden of proving that the work of the male and female selector-packers was equal or that defendant's wage differential was based on sex discrimination. While acknowledging that "in the assembly line phase of selecting and packing, both men and women perform identical functions" (Pet. App. A58), the district court accepted petitioner's "rationale" (Pet. App. A48) that, as a matter of economic necessity, it needed to have some of the common labor work performed by selector-packers, that male selector-packers as a class were considered able and available to perform such work whereas women as a class were considered of too "limited utility," and that, accordingly, the resultant "flexibility" of the men constituted a "realistic" difference between the work of the male and female selector-packers. The court concluded that this rationale, in addition to establishing the inequality of their work performance, satisfied the employer's burden of proving that the wage disparity was based on a "factor other than sex" within the meaning of the exception in Section 6(d)(1)(iv) of the Act.

The court of appeals unanimously reversed. Its construction of the term "equal" work was that it

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"did not require that the jobs be identical, but only that they must be substantially equal" since "[a]ny other interpretation would destroy the remedial purposes of the Act"—which was designed "to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers" (Pet. App. A73).[8] The court ruled that "Congress never intended * * * that an artificially created job classification which did not substantially differ from the genuine one could provide an escape for an employer from the operation" of the Act. "This would be too wide a door through which the content of the Act would disappear" (Pet. App. A73–A74). It held that the Secretary had "clearly established his *prima facie* case" (Pet. App. A75)—*i.e.*, that petitioner was paying women selector-packers less than men selector-packers

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[8] In addition to Section 6(d), which is set forth at Pet. 3-4, the Equal Pay Act of 1963 (77 Stat. 56) contains the following "Declaration of Purpose" and findings:

"Sec. 2(a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

"(1) depresses wages and living standards for employees necessary for their health and efficiency;

"(2) prevents the maximum utilization of the available labor resources;

"(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

"(4) burdens commerce and the free flow of goods in commerce; and

"(5) constitutes an unfair method of competition.

"(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries."

for performance of equal work—by showing the wage disparity, that both generally performed identical semi-skilled work, and that the other work which male selector-packers might perform during a small portion of their time amounted, in substance, to the same unskilled common labor performed by snap-up boys whose job carried virtually the same rate of pay as that paid the female selector-packers.

The burden of proof then fell upon the company, the court ruled, to establish its claim that the wage differential was based on "a factor other than sex" (Pet. App. A75–A76).[8] This burden was not met, the court concluded, because there was no finding or evidence in the record of the economic value of the labor of snap-up boys performed by male selector-packers, nor any finding or evidence substantiating the claim that the "element of flexibility" bore any relation to the 10 percent wage differential, or that all male selector-packers were available to do the snap-up work and that no female selector-packers were so available (Pet. App. A76). In cases such as this, "where the justification for the differential rests on economic benefit, the company has peculiarly within its knowledge the means of proof, and the burden therefore is one which cannot be satisfied by general or conclusory assertions" (*ibid.*).

The district court's conclusions that the disparity in wages was based upon "substantial differences"

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[8] Accord, *Shultz* v. *First Victoria National Bank*, 420 F. 2d 648, 654, n. 8 (C.A. 5); *Shultz* v. *American Can Company-Dixie Products*, C.A. 8, No. 19581, decided March 30, 1970, slip op., p. 9, n. 10, 19 WH Cases 424, 62 Lab. Cas. ¶ 32309.

and "upon factors other than sex" were held to be without adequate support in either the findings or the record, and therefore not binding on the court of appeals under the "clearly erroneous" rule (Pet. App. A77).

3. None of the questions which the petition poses for review is actually presented by the decision below or by the record in this case. Moreover, while the court below did decide questions of statutory interpretation (not presented in the petition) which are important to the administration and application of the Equal Pay Act, its decision was correct and is not in conflict with that of any other court of appeals. Accordingly, review by this Court is not warranted.

a. *Petitioner's question 1* is premised on the erroneous assumption that the district court's holding on the basic issue of equality of the work was conclusive and binding on the court of appeals and that the appellate court's decision therefore applies "even where the jobs are not equal" (Pet. 2). As previously noted, however, the court of appeals rejected the district court's interpretation of the statutory term "equal" as meaning "virtually identical," and, applying its own "substantially equal" interpretation, concluded that the Secretary's evidence established that the work of the men and women was equal.

Although petitioner asserts that the court of appeals "conceded that *some* differential was justified in Petitioner's case" (Pet. 14, emphasis petitioner's) and concerned itself only with "the precise *amount* of the

particular wage difference" (Pet. 13, emphasis petitioner's), petitioner cites nothing in the court of appeals opinion in support of these statements—which do not comport with our understanding of the decision below.

b. *Petitioner's question 2* is premised on the same misunderstanding of the decision below.

Properly understood, the decision below does not, as petitioner contends, present questions involving a "delicate legislative balance between the Equal Pay Act and Title VII of the Civil Rights Act" (Pet. 19). As the court of appeals explained (Pet. App. A75):

> It is not necessary here, however, to delineate the precise manner in which these two statutes must be harmonized to work together in service of the underlying Congressional objective. For even if the Civil Rights Act is put aside, the Equal Pay Act alone does not permit artificial classification to prevent inquiry whether there exists a difference in pay for substantially equal work.

Accordingly, petitioner's suggestion that the decision below has deprived it of recourse to the Civil Rights Act's more complex procedures prerequisite to the filing of suit under that Act (Pet. 19–20) is without substance. The decision below does not require petitioner to end any discriminatory employment practices other than the payment of unequal wages to men and women who perform equal work within the meaning of the Equal Pay Act, as to which the established remedy is that used here.

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c. *Petitioner's question 3* was not passed on by the court of appeals and is an issue petitioner is precluded from presenting here because of its failure to preserve it below by a cross-appeal.[10] *Morley Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191–192. In any event, the district court correctly denied petitioner's demand for a jury trial. *Sullivan* v. *Wirtz*, 359 F. 2d 426 (C.A. 5), certiorari denied, 385 U.S. 852.[11] It is established that the right to jury trial does not extend to statutory injunction suits brought by the officials responsible for enforcement of regulatory legislation.[12]

[10] There was no mention of the jury trial issue in either the briefs or the oral argument below.

[11] The *Sullivan* decision followed *Wirtz* v. *Jones*, 340 F. 2d 901 (C.A. 5). There have been no other appellate court decisions on this question in Fair Labor Standards Act cases, but the numerous district court decisions have uniformly reached the same conclusion. See, *e.g.*, *Wirtz* v. *Active City Wide Service Co.*, 230 F. Supp. 666 (N.D. Ill.); *Wirtz* v. *Robert E. Bob Adair, Inc.*, 224 F. Supp. 750 (W.D. Ark.); *Wirtz* v. *Tinker's Bigg & Littel Stores*, 16 WH Cases 657, 50 Labor Cases ¶ 31,622 (N.D. Cal., not officially reported); *Wirtz* v. *Moorehead*, 16 WH Cases 417, 49 Labor Cases ¶ 31,555 (W.D. S.C., not officially reported); *Wirtz* v. *Martin*, 17 WH Cases 609, 54 Labor Cases ¶ 31,883 (M.D. Pa., not officially reported); *Wirtz* v. *Florence and Co.*, 18 WH Cases 631, 58 Labor Cases ¶ 32,097 (D. Kan., not officially reported); *Wirtz* v. *Swann Oil Co.*, 18 WH Cases 672, 59 Labor Cases ¶ 32,117 (E.D. Pa., not officially reported).

[12] See, *e.g.*, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (action under National Labor Relations Act for back pay and reinstatement of wrongfully discharged employees); *Co-Efficient Foundation* v. *Woods*, 171 F. 2d 691 (C.A. 5); *McCoy* v. *Woods*, 177 F. 2d 354 (C.A. 4); *Howard* v. *United States*, 214 F. 2d 759 (C.A. 10); *Leimer* v. *Woods*, 196 F. 2d 828 (C.A. 8); *Johnson* v. *Georgia Highway Express Inc.*, 417 F. 2d 1122 (C.A. 5); *Smith* v. *Hampton Training School for Nurses*, 360 F. 2d 577 (C.A. 4).

Petitioner's reliance on *Ross* v. *Bernhard*, 396 U.S. 531, and *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27, involving suits by private individuals, is misplaced. The stockholders' derivative action in *Ross* sought to enforce "legal claims of the corporation" which was the "real party in interest" (396 U.S. at 539, 542). By contrast, the purpose of a suit by the Secretary of Labor for a statutory injunction "is not to collect a debt owed by an employer to his employee but to correct a continuing offense against the public interest," and the award of back pay "is simply a part of a reasonable and effective means which Congress, after trial and error, found it necessary to adopt to bring about general compliance * * *." *Wirtz* v. *Jones, supra*, 340 F. 2d at 904.

d. As to the issues actually decided, the decision of the court below is correct. The principal question in the case was the meaning of the statutory term "equal" (in referring to "work," "responsibility," etc.). If "equal" were held to mean "identical" or "substantially identical" (as it was by the district court (Pet. App. A55)), the declared purpose of the Act to correct the deleterious conditions resulting from "wage differentials based on sex" would be virtually destroyed and its specific prohibitions rendered almost meaningless. The court of appeals correctly held that this was reason enough for rejecting such a self-defeating interpretation and ruled instead that Congress intended only to require that the jobs be "substantially equal" (Pet. App. A73). This interpretation accords with the language, the remedial purposes, and the legislative history of the Act.

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Not only is the word "identical" absent from the statute, but if Congress had intended the prohibited wage differentials to apply only to identical jobs, there would have been no occasion to provide the statutory criteria of "skill, effort, and responsibility" by which to measure the equality of job requirements. And the legislative history also supports the court of appeals' interpretation, despite some statements and discussion in the House debates which might foster the "identical" or "virtually identical" interpretation (see, *e.g.*, excerpts relied upon by petitioner at Pet. 17).[13] A contrary intent was made unmistakably clear in the Senate by Senator McNamara, who guided the bill through the Senate and was chairman of the subcommittee that handled it. Referring to such House discussion, Senator McNamara stated flatly that "it is *not the intent* of the Senate that jobs must be identical," adding that "[s]uch a conclusion would be obviously ridiculous" (109 Cong. Rec. 9761; emphasis added).[14]

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[13] See *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543; *Idaho Sheet Metal Works* v. *Wirtz*, 383 U.S. 190, 201, holding that even where a "literal reading" (383 U.S. at 200) and "[s]ome statements in the [legislative] debates explicitly foster this reading" (383 U.S. at 199), an interpretation which "would compel results flatly inconsistent with those Congress explicitly contemplated" (383 U.S. at 201) should be rejected.

[14] In submitting the bill to the Senate, Senator McNamara stated: "It is most important that the Senate intent be made clear as to language in the bill which is the same in both the Senate and House versions," since "[t]he discussion that surrounded the congressional consideration of this bill has somewhat clouded the question of the definition of 'equal skills, efforts, and responsibilities'" (109 Cong. Rec. 9761). He pointed out that the Senate Report contained "a rather lengthy

"Substantially equal" jobs can, of course, involve *some* differences. As the earliest decisions under the Equal Pay Act pointed out: "Jobs are seldom identical in every respect; small differences in job requirements can easily be made but make no real difference where the work is substantially the same" (*Wirtz* v. *Rainbo Baking Co.*, 303 F. Supp. 1049, 1052 (E.D. Ky.); *Wirtz* v. *Basic Incorporated*, 256 F. Supp. 786 (D. Nev.)).

Petitioner's assumption that the district court's "substantially identical" interpretation of the statute was correct—*i.e.*, that a simple finding of "additional" or "different" duties in job performance suffices to establish that the jobs are not "equal"—underlies its erroneous contention that the court of appeals decision is contrary to the "rulings and regulations of the Department of Labor" (Pet. 14, 18–19). The excerpts from the regulations quoted on page 18 of the petition apply only to "situations in which a review of all pertinent facts will *clearly establish* that the male and female employees in question are *not* performing equal work * * *" (emphasis added).[15]

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discussion * * * on the methods and procedures which the Department should utilize to determine which jobs do involve equal skills, efforts, and responsibilities * * * [which] makes it clear that it is not the intent of the Senate that jobs must be identical" (*ibid.*).

[15] Petitioner similarly misapprehends (at Pet. 19) the "Letter Opinion of June 3, 1964" (Pet. App. A80–A83), which is expressly limited "solely" to the specific situation described, and specifically states that "mere differences in the *kind* of effort" do not make jobs unequal, and that "a careful scrutiny and evaluation of the facts in each case would be necessary before a firm answer could be given" to the question whether performance requirements of "different" duties are "*actually* so sub-

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Those parts of the Department's Interpretative Bulletin which are omitted from petitioner's excerpts emphasize the caveats that " 'equal' does not mean 'identical' "[16] and that "[d]ifferences only *in the kind of effort required,*" where *"there is no substantial difference in amount or degree of effort* * * * will not justify wage differentials" (emphasis added).[17]

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stantially different as to render the jobs *as a whole* unequal in significant respects under the statutory tests" (Pet. App. A82). Subseqeunt Wage-Hour opinion letters specifically warned against "any attempt to extend the scope of" the June 3, 1964 opinion (these opinions of Sept. 25, 1964, and Jan. 14, 1965 (reprinted in WHM 95: 614, 623), were furnished petitioner's counsel along with the June 3, 1964 letter).

[16] This section of the Bulletin states further:

"* * * Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable. * * * In determining whether job differences are so substantial as to make jobs unequal, it is pertinent to inquire whether and to what extent significance has been given to such differences in setting the wage levels for such jobs. Such an inquiry may, for example, disclose that apparent differences between jobs have not been recognized as relevant for wage purposes and that the facts as a whole support the conclusion that the differences are too insubstantial to prevent the jobs from being equal in all significant respects under the law." 29 C.F.R. 800.122.

[17] Immediately following the excerpt quoted at Pet. 18, the same Section states:

"* * * Where jobs are otherwise equal under the Act, and there is no substantial difference in the amount or degree of effort which must be expended * * * *the jobs may require equal effort* * * * *even though the effort may be exerted in different ways on the two jobs. Differences only in the kind of effort*

The other significant aspect of the decision below concerns the interpretation and application of the "other than sex" statutory exception. The court of appeals rejected the district court's ruling that defendant satisfied its burden of proof on this issue by showing a need for flexibility. The court of appeals correctly held that petitioner's sex-grouped classifications, which merely assumed that all males but no females possessed the attributes of "flexibility" presumably required, did not suffice to meet its burden of proof, absent more specific findings and substantiating evidence (see *supra,* p. 8). As the Court of Appeals for the Fifth Circuit noted in *Shultz* v. *First Victoria National Bank, supra,* "the exception will swallow the rule" of "equal pay for equal work" if wage differentials could be justified simply on the basis of an undocumented alleged need for sex-grouped classifications. 420 F. 2d at 657, citing *Weeks* v. *Southern Bell Tel. & Tel. Co.,* 408 F. 2d 228, 235

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*required * * * in such a situation will not justify wage differentials.*" 29 C.F.R. 800.127; emphasis added.

And, of particular significance here, the following Section states:

"* * * The difference *in kind of effort* required *of the employees does not appear to make their efforts unequal in any respect which would justify a wage differential, where such differences in kind of effort * * * are not ordinarily considered a factor in setting wage levels.* * * * a serious question would be raised about the bona fides of a wage differential if it is paid to a male employee who is otherwise performing equal work with female employees on the basis that the male is required to do some heavy lifting, *unless a similar distinction in wage rates is made in the establishment as between male employees only* where some do heavy lifting and others do not." 29 C.F.R. 800.128; emphasis added.

(C.A. 5). Cf. *Idaho Sheet Metal Works* v. *Wirtz*, 383 U.S. 190, 208–209. Here, as in *First Victoria Bank*, there was a wage classification or program which "starts with discrimination on sex with no showing yet that any exception would justify it" (420 F. 2d at 659); and "such imprecise programs are * * * not in harmony with the Congressional purpose: The elimination of those subjective assumptions and traditional stereotyped misconceptions regarding the value of women's work" (420 F. 2d at 656).[18]

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[18] The court of appeals also correctly held that petitioner's proof was defective for the additional reason that it failed to show that the element of flexibility bore any relation to the amount of the wage differential (Pet. App. A76). As the Senate Report stated, the Act was "designed to eliminate *any* wage differentials which are based on sex" (109 Cong. Rec. 8915; emphasis added). And the Department's Interpretive Bulletin accordingly provides that "the requirements for such an exception *are not met unless the factor of sex provides no part* of the basis for the wage differential" (29 C.F.R. 800.142; emphasis added), and that a showing of "absence of sex as a factor" may be "*incomplete without a showing that there is a reasonable relationship between the amount of the differential* and the weight properly attributable to the factor other than sex" (*id.* at 800.143; emphasis added).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1969.

No. 1388.

WHEATON GLASS COMPANY, a Corporation,
Petitioner,

v.

GEORGE P. SHULTZ, Secretary of Labor,
United States Department of Labor.

REPLY MEMORANDUM FOR PETITIONER.

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REPLY MEMORANDUM FOR PETITIONER.

This short Reply Memorandum is not intended as a comprehensive rebuttal of all contentions raised by Respondent, but only those to which some response was deemed appropriate.

1. Respondent completely misapprehends the holding of the Court of Appeals, which clearly did *not* turn on a difference with the District Court on the interpretation of the word "equal"[1] since the District Court expressly adopted the "substantially equal" test (Petition, A40, 52-54, 57-59):

> "The factual dispute between the parties involves the question of how much, if any, of the work performed by male selector-packers **differs substantially** from that performed by the females."
>
> • • •
>
> "The *basic issue,* of course, requires a determination of whether there is a difference in fact between male

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1. In any event, Respondent concedes that there are substantial grounds for a difference of opinion as to how the word "equal" should be interpreted, and admits that the proper interpretation raises important issues in the administration and application of the Equal Pay Act (Memorandum for the Respondent in Opposition, pp. 13, 9). While Respondent cites some legislative history from the Senate on the point, the legislative history in the House of Representatives relied upon here by Petitioner is controlling. Representative Goodell was the author of the first bills *in either body of Congress* to place the Act under the Fair Labor Standards Act of 1938 and to use the words "effort," "responsibility" and "working conditions" in defining equal work. It was also the House, not the Senate, which substituted the word "equal" for the word "comparable." Although the Senate bill, S. 1409, became the Act in title, it did not become the Act in substance. The House Amendments to the Senate bill, which were agreed to and adopted *in toto* by the Senate and enacted into law, struck out all the Senate bill after the enacting clause and inserted the House bill as the text of the Act in lieu thereof (109 Cong. Rec. 9761-9762).

and female performance in the job of selector-packer and, if so, *whether such difference is* **essential** *and* **substantial** enough to constitute a realistic economic basis for disparity in wage rates. However, *if such difference is merely incidental, insignificant and insubstantial* to the performance of the principal task of the department in question, then it must be concluded that it is more artificial than real, leaving sex as the only realistic and distinctive basis for the wage disparity, contrary to the Act." (Petition, A40, 53-54) (Emphasis and boldface supplied.)

2. Rather than rest its decision on the interpretation of the word "equal," as Respondent contends, the Court of Appeals performed a judicial job evaluation at the appellate level and clearly indicated its decisional reliance upon the *amount* of the particular wage differential (Petition, A67, 71, 75, 76).[2] Indeed, the Court of Appeals repeatedly referred to the existence of a "10% pay differential," citing it some eight times (Petition, A65, 70, 71, 75, 76). As pointed out in the Petition, such a decision not only is unsupported by the statutory language, legislative history and administrative regulations, but emasculates the conciliatory framework of Title VII of the Civil Rights Act of 1964 by incorporating its broader reach into the Equal Pay Act (Petition, A19-20).[3]

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2. Performance of such a judicial job evaluation is contrary to the clear legislative history of the Equal Pay Act. Since 1945 equal pay bills were introduced in every session of Congress by members of both politcial parties. However, it was not until the 88th Congress and after the word "equal" had been substituted for the word "comparable" in describing work for which equal pay was being mandated that the enactment of an equal pay bill became possible (108 Cong. Rec. 14767-14768, 14771).

3. Title VII of the Civil Rights Act provides a complete panoply of rights to females injured by alleged discrimination based on sex in access to employment opportunities.

Thus, it is respectfully submitted that the Petition raises important questions of federal law which this Court should resolve.

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Dated: May 11, 1970.

CERTIFICATE OF SERVICE.

I hereby certify that on this 11th day of May, 1970, five copies of the Reply Memorandum for Petitioner were hand delivered to each of the following attorneys:

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I further certify that all parties required to be served have been served.

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